TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 587

SAMUEL R. TOUCEY, PETITIONER,

vs.

NEW YORK LIFE INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 20, 1940.

CERTIORARI GRANTED JANUARY 6, 1941.

United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,686

CIVIL.

SAMUEL R. TOUCEY, APPELLANT,

vs.

NEW YORK LIFE INSURANCE COMPANY, A CORPORATION, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI

FILED FEBRUARY 7, 1940.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 6, 1941.

[fol. 1] United States of America—Set.:

Be it remembered that heretofore, to-wit, at the regular November term of the United States District Court for the Western Division of the Western District of Missouri, and on the 5th day of February, 1936, there was filed in the office of the clerk of said court a Transcript on Removal from the Circuit Court of Jackson County, Missouri, in the cause wherein Samuel R. Toucey is Plaintiff and New York Life Insurance Company, a corporation, is Defendant.

The Petition, Petition for Removal, Removal Bond, Notice of filing Petition and Bond, Order of Removal and Certificate of the Clerk contained in said Transcript, captions omitted, are as follows:

(Petition)

I.

Comes plaintiff in the above entitled cause and for his cause of action herein states that the defendant is a mutual life insurance company organized and existing under the laws of the state of New York and authorized to do business in the state of Missouri, with a branch office of said company located in Kansas City, Jackson County, Missouri, and as such mutual life insurance company the defendant is authorized and empowered to write insurance policies upon the lives of individuals, providing for the payment of certain sums upon their death or disability, and as such said defendant is liable to suit in the courts of this state.

II.

Plaintiff further states that on the 2nd day of January, 1924, the defendant issued its life insurance policy = 8 611

895 on the life of plaintiff herein by which it agreed to pay [fol. 2] plaintiff's beneficiary a death benefit of Fifty Thousand Dollars ($50,000.00) and the sum of Five Hundred Dollars ($500.00) each month during the lifetime of the plaintiff, and also to waive the payment of premiums on said policy if said plaintiff became wholly and presumably permanently disabled before the age of sixty years by bodily injury or disease, so that he would be thereby prevented from engaging in any occupation for remuneration or profit in case such disability occurred after said policy took effect and before the anniversary at which plaintiff's age at the latest birthday was sixty years; that plaintiff upon delivery of said policy paid a premium of Two Thousand, One Hundred Eighty-two Dollars ($2,182.00) in advance and paid all premiums on said policy until the quarterly premium due on October 2, 1934, which was not paid for the reasons hereinafter set out.

III.

Plaintiff further states that on or about the 1st of July, 1934, and while the aforesaid policy of insurance was in full force and effect, plaintiff had other life insurance with the defendant company, being policies #10 226 440, #10 391 096 and #10 533 974, which, together with the above policy #8 611 895 for the sum of Fifty Thousand Dollars ($50,000.00), provided for One Hundred Thousand Dollars ($100,000.00) death benefits; that on or about the 1st of July, 1934, plaintiff consulted the Treasurer and other agents and employees of the branch office of the New York Life Insurance Company in Kansas City, Missouri, about his life insurance policies with said company, informing said officers and employees at that time that he was totally disabled and had been since April, 1933, because of an operation for stomach ulcers; that he could not work and on that account could not pay the premiums on all the aforesaid life insurance policies, and asked said officers and employees of the defendant company to analyze said policies and advise him as to the coverage of all of his policies with [fol. 3] said company, and what values existed in said policies at that time; that the officers, employees and agents of said Kansas City branch office of the defendant company, although being theretofore advised as to plaintiff's physical condition, fraudulently advised plaintiff that if he

would surrender the three policies numbered 10 226 440, 10 391 096, and 10 533 974, and reduce the death benefits of his policy #8 611 895 from Fifty Thousand Dollars ($50,000.00) to Twenty-five Thousand Dollars ($25,000.00), with a corresponding reduction in the premium and monthly payment of disability benefits from Five Hundred Dollars ($500.00) per month to Two Hundred Fifty Dollars ($250.00) per month, he would receive approximately Eleven Hundred Fifty Dollars ($1150.00) in cash, and that there would be sufficient values left in said policy #8 611 895 as so reduced to carry such reduced policy until the 2nd of January, 1935.

IV.

Plaintiff further states that after being advised as aforesaid by the officers, employees and agents of the branch office of the defendant company at Kansas City, Missouri, that he would receive approximately Eleven Hundred Fifty Dollars ($1150.00) upon the cancellation of said three numbered policies aforesaid, and the reduction of policy #8 611 895, as aforesaid, on the ..... day of August, 1934, he received notice from said branch office of the defendant company in Kansas City that a mistake had been made in computing his benefits under all of said policies; that instead of the company owing him about Eleven Hundred Fifty Dollars ($1150.00), he would owe the company Two Hundred Thirty-four Dollars ($234.00), and not knowing his rights in the premises, and not knowing whether this advice was correct or not, he paid under protest the quarterly payment due on the 2nd of July, 1934, on said policy #8 611 895. That plaintiff, realizing and believing that he could not rely upon information received from the branch office of the New York Life Insurance Company wrote the [fol. 4] home office of the defendant company in the City of New York, on August 11, 1934, notifying and advising said home office that he had spent several months trying to find out just what his policies were worth, and had found that the advice given him by the Kansas City office was wrong, and that he desired of the home office that a complete analysis of his four policies be made for coverage and values and that he be advised his exact status and rights under said insurance. He also notified said company at the same time in writing, while said policy #8 611 895 was

in full force and effect, that he was totally disabled and could not work; that his income had ceased and if his insurance was cancelled he could not secure other insurance because of his physical condition; that he had been operated on in April, 1933, for stomach ulcers. That, although this defendant was so notified, said defendant fraudulently failed to advise this plaintiff that if he was totally disabled by disease, his policy provided for certain disability benefits because of such disease, defendant knowing and being advised in writing that plaintiff did not know his rights under said policy and the coverage thereof, and was asking defendant company for advice as to the coverage of said policy, and the defendant knowing that plaintiff was ignorant of his rights under said policy, and knowing that plaintiff was totally disabled and had been since April, 1933, and defendant knowing that plaintiff was unable to work and could not pay the premiums on his insurance policies, and knowing that the plaintiff had been wrongfully advised as to his rights under his policies by the officers and agents of said defendant company's branch office in Kansas City, Missouri, and knowing that at the time said policy #8 611 895 was issued to plaintiff, in the year 1924, plaintiff was then of the age of forty-five years, and knowing that plaintiff was of the age of fifty-five years at the time it received notice of his total disability, it fraudulently and intentionally failed to advise the plain-[fol. 5] tiff of his rights under said policy #8 611 895, and fraudulently induced the plaintiff to reduce said insurance from a principal sum of Fifty Thousand Dollars ($50,000.00) to Twenty-five Thousand Dollars ($25,000.00), and fraudulently reduced the disability benefits thereof from Five Hundred Dollars ($500.00) per month to Two Hundred Fifty Dollars ($250.00) per month, and that because of said actions by defendant and its fraudulent failure and refusal to advise plaintiff of his rights under said policy, plaintiff was led by the conduct and actions and silence of the defendant, as aforesaid, to make said reductions in said policy, as aforesaid, and because of said facts as herein alleged, plaintiff acted to his irreparable injury and defendant is now estopped to claim or assert that due proof was not made on August 11, 1934, of total and permanent disability as provided by the terms of said policy.

V.

Plaintiff further states that at the time said defendant company attempted to reduce said policy, said defendant knew, by written notice dated June 29, 1934, that plaintiff was totally and permanently disabled, and knew that the contingent rights of plaintiff to disability benefits and waiver of premiums under the terms of said policy had then become fixed liabilities of the defendant company, and well knew that the plaintiff was ignorant of his rights under said policy, fraudulently reduced same, as aforesaid, without any consideration whatever for said reduction, and that said reduction of said policy both as to death and disability benefits was wholly without consideration and fraudulent and void as aforesaid.

VI.

Plaintiff further states that in September, 1935, and a few days after being advised by a medical examiner that his policy covered disability benefits for disease, plaintiff made oral demand upon the defendant company at its [fol. 6] branch office in Kansas City for the payment of disability benefits, and the reinstatement of his policy #8 611·895, which defendant had unlawfully cancelled because of the alleged failure to pay the premium due on October 2, 1934, thereon, but that defendant failed and refused on September 26, 1935, to reinstate said policy so unlawfully cancelled and to pay any disability benefits thereunder, for the reason stated in its written notice to the Kansas City branch office of the New York Life Insurance Company that due proof had not been given within six months after the cancellation of such policy, although this defendant well knew that in June and August, 1934, and while said policy was in full force and effect, it had received written notice of the total disability of plaintiff by disease, and his inability to pay premiums on said policies, and defendant well knowing that plaintiff was then under the age of sixty years, and that said disability benefits had continued for more than three months, and well knowing that said policy provided for the waiver of premiums and the payment of monthly benefits so long as said total disability should continue, and well knowing that the plaintiff did not know of his rights under said policy, and well knowing

that plaintiff had asked for an analysis of his policies of the defendant company at its home office in New York City, knowingly and fraudulently and intentionally failed and refused to advise plaintiff as to his rights, and failed and refused to advise him that said policy would be kept in force by the waiver of premiums if he was totally disabled, and misled the plaintiff to his irreparable injury, and unlawfully and fraudulently cancelled said policy #8 611 895, although plaintiff has paid defendant in premiums on said policy approximately Twenty-two Thousand Dollars ($22,000.00).

VII.

Plaintiff further states that he faithfully and fully performed all the terms and conditions of said policy, and that he was wholly and presumably permanently disabled [fol. 7] before reaching the age of sixty years and has been since April, 1933, when he was fifty-four years of age, and that he was so totally and wholly disabled by disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit, and that he was so totally disabled for more than three consecutive months immediately before August 11, 1934, when he gave the defendant company at its home office in the City of New York notice of such total and permanent disability by disease, and that he is still totally and permanently disabled, and that said policy #8 611 895 was in full force and effect when his disability as aforesaid was incurred, and that he was so disabled as aforesaid on August 11, 1934, while said policy was in full force and effect and before any default in the payment of the October, 1934, premium thereon; that although defendant knew of said disability and that plaintiff was wholly disabled by disease, as aforesaid, on and for many months before August 11, 1934, and knowing that plaintiff at the time of his disability was under the age of sixty years, and knowing that said policy, at the time defendant received written notice at its home office in New York of such disability, was in full force and effect, and knowing that plaintiff was asking the officials, officers and agents of the defendant company at its home office in New York to advise him as to the coverage of said policy and his rights thereunder, that said defendant fraudulently and wilfully failed and refused to advise the plaintiff, although

it was its duty so to do, but on the contrary led plaintiff to believe that his only rights under said policy were to either pay the premiums thereon or to carry the same as long as it could be carried as extended insurance, and thereby misled the plaintiff, to his irreparable damage.

Plaintiff further states that because of the foregoing, he is entitled under the facts herein alleged to have the attempted reduction of his policy #8 611 895 set aside and for naught held, and to have the attempted cancellation of [fol. 8] said policy adjudged to be of no force and effect, and that he is entitled to recover of defendant disability benefits under said policy as provided for therein from August 11, 1934, and for the waiver of premiums on said policy so long as plaintiff is totally and permanently disabled because of disease.

VIII.

Wherefore, plaintiff prays that said policy #8 611 895 of the defendant company be adjudged to be in full force and effect, and that said policy be reinstated and that the attempted reduction thereof as of July 2, 1934, be declared to be null and void, and that the premiums thereon be declared waived by the defendant company because of the total and permanent disability of the plaintiff for such time that such disability shall continue, and further prays for the recovery of the sum of Five Hundred Dollars ($500.00) for disability benefits per month from August 11, 1934, and for return of the said premium paid for the quarter beginning July 2, 1934, and for interest on each of these sums at the rate of six per cent. (6%) per annum, and plaintiff prays for such other and further relief as to the court seems meet and equitable and for the costs of this suit.

CHAS. M. HOWELL,
CHAS. M. HOWELL, JR.
WM. H. ALLEN,
SCOTT R. TIMMONS,
Attorneys for Plaintiff.

Filed in the Circuit Court of Jackson County, Mo., Oct. 26, 1935.

(Petition for Removal of Cause to Federal Court.)

To the Honorable, the Circuit Court of Jackson County, Missouri:

Your petitioner, New York Life Insurance Company, respectfully shows that it is the only defendant in the above entitled cause, and that the matter in dispute in said cause exceeds, exclusive of interest and costs, the sum or [fol. 9] value of Three Thousand ($3,000.00) Dollars.

Your petitioner further shows that said suit is of a civil nature, being an action brought by plaintiff against your petitioner in and by which plaintiff seeks to compel your petitioner to reinstate a certain policy of life insurance, being New York Life Insurance Company Policy No. 8,611,895, which had been originally issued in the face amount of Fifty Thousand ($50,000.00) Dollars but which had by agreement of the parties been reduced to the face amount of Twenty-five Thousand ($25,000.00) Dollars and which had later been cancelled by your petitioner because of the failure of the plaintiff to pay the premiums thereon, and plaintiff seeks to have said policy reinstated; that said suit also seeks to compel your petitioner to waive the payment of premiums on said policy and to compel your petitioner to pay to plaintiff the sum of Five Hundred ($500.00) Dollars per [months] as disability benefits from August 11, 1934, and to return to plaintiff a premium paid on July 2, 1934, with interest on all of said sums at the rate of six per centum per annum; it being alleged that plaintiff is entitled to said disability benefits and the waiver of said premiums by virtue of the terms of the disability benefit provisions of said policy, alleging that plaintiff is and has been since April, 1933, totally and permanently disabled within the terms and meaning of said policy; and said suit further asks for such other and further relief as to the Court seems meet and equitable.

Your petitioner further shows that said suit involves a controversy wholly between citizens of different states, to-wit: between plaintiff, who is now and was at the time of the commencement of this suit, a citizen and resident of the State of Missouri, and your petitioner, who is now and was at the time of the commencement of this suit a citizen

and resident of the State of New York, being a corporation duly created and existing by authority of the laws of the State of New York, and a non-resident of the State of [fol. 10] Missouri, and that this controversy can be wholly determined between plaintiff and your petitioner.

And your petitioner offers herein a bond with good and sufficient surety in the penal sum of Two Hundred Fifty ($250.00) Dollars, conditioned for its entering in the District Court of the United States for the Western Division of the Western District of Missouri, within thirty days from the date of filing this petition and the said bond for removal, a copy of the record in this suit and for the payment of all costs which may be awarded by said District Court of the United States if said District Court of the United States should hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays this Honorable Court to proceed no further herein except to make an order of removal as required by law, and to accept said surety and bond and to cause the record here in to be removed into said District Court of the United States within and for the Western Division of the Western District of Missouri, according to the statutes in such cases made and provided.

And your petitioner will ever pray, etc.

NEW YORK LIFE INSURANCE COMPANY, Petitioner,
By Lathrop, Crane, Reynolds, Sawyer & Mersereau,
Attorneys for Petitioner.

State of Missouri,
County of Jackson—ss.:

Richard S. Righter, of lawful age, being duly sworn, on his oath says that he is an attorney and an agent of and for New York Life Insurance Company, the maker of the above and foregoing petition for removal, and well knows the contents thereof, and that the statements and allegations therein made and contained are true.

RICHARD S. RIGHTER.

Subscribed and sworn to before me this 11th day of January, 1936.

(Seal) LOTTIE L. VOGEL,
Notary Public within and for
[fol. 11] Jackson County, Missouri.

My commission expires: May 11-1936.

Filed in the Circuit Court of Jackson County, Mo., Jan. 13, 1936.

(Removal Bond)

Know All Men By These Presents:

That we, New York Life Insurance Company, as principal, and National Surety Corporation, as surety, are held and firmly bound unto Samuel R. Toucey, and all other persons whom it may concern, in the penal sum of Two Hundred Fifty ($250.00) Dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Whereas, New York Life Insurance Company, the principal above named, has petitioned the Circuit Court of Jackson County, Missouri for the removal of a certain suit therein pending, wherein said Samuel R. Toucey is plaintiff and said New York Life Insurance Company is defendant, into the District Court of the United States for the Western Division of the Western District of Missouri;

Now, Therefore, the condition of this obligation is such that if the above bounden, New York Life Insurance Company, shall, within thirty days from the date of filing the petition and this bond for the removal of this cause to said District Court of the United States, enter in said District Court of the United States a copy of the record in this suit, and shall pay all costs that may be awarded by said District Court of the United States, if said District Court of the United States shall hold that this suit was wrongfully or improperly removed thereto, and shall also appear in said District Court of the United [Statea] [fol. 12] and enter special bail in said cause if special bail was originally required therein, and shall do such other appropriate acts as by the Act of Congress in that behalf

are required to be done upon the removal of said suit from the State Court into the United States Court, then this obligation shall be void; otherwise of force.

Witness our hands and seals this 11th day of January, 1936.

NEW YORK LIFE INSURANCE COMPANY, (Seal)
By Lathrop, Crane, Reynolds, Sawyer & Mersereau,
Its Attorneys-in-fact.

NATIONAL SURETY CORPORATION, (Seal)
By F. A. Brinkman,
Its Attorney-in-fact.

Filed in the Circuit Court of Jackson County, Mo., Jan. 13, 1936.

(Notice of Filing Petition and Bond for Removal.)

To the Plaintiff in the above entitled cause:

You are hereby notified that the defendant in the above entitled cause will, on the first day of the January Term, 1936 of the above named Court, file in the above entitled cause in said court a petition and bond for the removal of said cause from said court to the District Court of the United States for the Western Division of the Western District of Missouri, copies of which petition and bond are herewith delivered to you.

LATHROP, CRANE, REYNOLDS, SAWYER & MERSEREAU,
Attorneys for Defendant.

Service of the above notice and receipt of copies of the petition and bond for removal therein mentioned are hereby acknowledged this 13th day of January, 1936.

CHAS. M. HOWELL,
SCOTT R. TIMMONS,
CHAS. M. HOWELL, JR.,
Attorneys for Plaintiff.

[fol. 13]

Filed in the Circuit Court of Jackson County, Mo., Jan. 13, 1936.

(Order of Removal.)

January 23, 1936.

Now on this day this cause coming on for hearing upon the petition of the defendant for the removal of this cause to the District Court of the United States, and it appearing to the Court that the defendant has filed its petition for such removal in due form of law and has heretofore filed its bond for removal, which said bond is by the Court approved and petition granted.

It is thereupon ordered by the Court that this cause be and the same is hereby removed from this Court within and to the District Court of the United States, in and for the Western Division of the Western District of Missouri, at Kansas City.

(Clerk's Certificate to Transcript from State Court.)

State of Missouri,
County of Jackson—ss.:

I, John D. Burns, Clerk of the Circuit Court within and for the County and State aforesaid, do hereby certify that the above and foregoing is a true, full and complete copy of the record and filings in the above entitled cause as the same appear of record and on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Kansas City, Missouri, this 3rd day of February, 1936.

(Seal)

JOHN D. BURNS, Clerk.
By M. Shaughnessy, D. C.

[fol. 14] (Application of New York Life Insurance Company for Leave to File Supplemental Bill in Equity.)

Now comes New York Life Insurance Company and prays the Court to make an order granting it leave forthwith to file its supplemental bill in equity herein.

GEORGE J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Solicitors for Defendant New York Life Insurance Company.

Filed in the United States District Court, Mch. 10, 1938.

(Order Granting New York Life Insurance Company Leave to File Supplemental Bill in Equity.)

For good cause shown leave is hereby granted to New York Life Insurance Company forthwith to file herein its supplemental bill in equity.

Dated at Kansas City, Missouri this 10th day of March, 1938.

MERRILL E. OTIS, Judge.

Filed in the United States District Court, Mch. 10, 1938.

[fol. 15] Supplemental Bill In Equity of New York Life Insurance Company.

In the District Court of the United States For the Western Division of the Western District of Missouri.

November Term, 1937.

Samuel R. Toucey, Plaintiff,
No. 2810. vs. In Equity.
New York Life Insurance Company, a corporation, Defendant.

Now comes New York Life Insurance Company, a corporation, and for its supplemental bill in equity herein and for its cause of action against plaintiff states:

1. That on or about the 26th day of October, 1935, plaintiff Samuel R. Toucey commenced this action in equity

against this defendant in the Circuit Court of Jackson County, Missouri wherein said Toucey alleged and claimed that he was the assured in New York Life Insurance Company's policy No. 8611895 in the face amount of Fifty Thousand Dollars ($50,000.00), in which the insurer also agreed to pay the sum of Five Hundred Dollars ($500.00) per month during the lifetime of said Toucey and to waive the payment of premiums if said Toucey became wholly and presumably permanently disabled by bodily injury or disease before age sixty, as in said policy defined and limited; that said petition further states that said Toucey paid the premiums on said policy until October 2, 1934; that the quarterly premium due on that day was not paid; said petition further states that about July 1, 1934 said Toucey informed various officers and employees of New York Life Insurance Company at its Kansas City branch office that he was totally disabled and had been so disabled since April, 1933 because of an operation for [fol. 16] stomach ulcers, and that said Toucey could not work on that account, and asked said officers and employees to examine said policy and other policies belonging to said Toucey and advise him as to the coverage under said policies and what value existed in said policies at that time; that said petition further alleged that said officers and agents of said Kansas City branch office fraudulently advised said Toucey that if he would surrender three other policies held by him in New York Life Insurance Company and reduce the death benefits under said policy No. 8611895 from Fifty Thousand Dollars ($50,000.00) to Twenty-five Thousand Dollars ($25,000.00) with a corresponding reduction of the monthly disability benefits from Five Hundred Dollars ($500.00) to Two Hundred Fifty Dollars ($250.00) per month he would receive approximately Eleven Hundred Fifty Dollars ($1150.00) in cash and that there would be sufficient values left in said policy No. 8611895, if so reduced, to carry said reduced policy until the 2nd of January, 1935; that said petition further alleged that thereafter and on the ..... day of August, 1934 said Toucey was notified by said branch office that a mistake had been made in computing his benefits under said policies and that instead of the New York Life Insurance Company owing Toucey Eleven Hundred Fifty Dollars ($1150.00) Toucey would owe said company Two Hun-

dred Thirty-four Dollars ($234.00), and that not knowing his rights in the premises or whether said advice was correct, said Toucey paid under protest the quarterly premium due July 2, 1934 on said policy No. 8611895. Said petition further alleged that said Toucey on August 11, 1934 notified said company that he was totally disabled and could not work and that although so notified said company fraudulently failed to advise him that if he was totally disabled by disease his policy provided for certain [fol. 17] disability benefits because of such disease, said Toucey being then ignorant of his rights under said policy; that said company's failure to advise said Toucey of his rights was fraudulent and intentional and that Toucey was led by said conduct and silence of said company to make the said reduction in said policy and that said company was thereby estopped to claim or assert that due proof was not made on August 11, 1934 of total and permanent disability as provided by the terms of said policy; that said petition further stated that said Toucey became totally disabled in April, 1933 and has since been so disabled so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit and was so disabled for more than three consecutive months before August 11, 1934 and was ~~still~~ so totally disabled at the time of the filing of said petition. Said petition prays that said policy be adjudged to be in full force and effect and that it be reinstated and that the attempted reduction thereof as of July 2, 1934 be declared null and void and that the premiums thereon be declared waived because of the total and permanent disability of the plaintiff, and for the recovery of Five Hundred Dollars ($500.00) per month in disability benefits from August 11, 1934, with interest and for such other and further relief as the Court deemed meet and equitable and for costs. A copy of said petition, marked Exhibit "A", is attached hereto and by reference made a part hereof.

2. Defendant further states that summons was duly issued pursuant to the filing of said petition and was duly served on New York Life Insurance Company, returnable the second Monday in January, 1936. That on said date New York Life Insurance Company duly filed in the Circuit Court of Jackson County, Missouri a petition to re-

move said cause to the United States District Court for [fol. 18] the Western District of Missouri; that an order removing said case to said court was duly made pursuant to said petition, a sufficient removal bond having been filed at the same time; that thereafter a good and sufficient removal transcript was duly prepared by the Clerk of said Circuit Court and was in proper time duly filed in said United States District Court and said cause was docketed in equity in said Court and numbered 2810; that thereafter New York Life Insurance Company filed on February 21, 1936, a motion to dismiss said cause on the ground that plaintiff's petition therein did not state facts sufficient to constitute a cause of action against defendant and did not state facts sufficient to entitle the plaintiff herein, Samuel R. Toucey, to the relief prayed for in said petition; that said motion was overruled by the Court on the 13th day of March, 1936; that thereafter and on April 23, 1936 New York Life Insurance Company, defendant in this cause, duly filed its answer and motion to dismiss said cause, a copy of which, marked Exhibit "B", is hereto attached and by reference made a part hereof; that by said answer New York Life Insurance Company denied that plaintiff paid all premiums on said policy until the quarterly premium due October 2, 1934, but admitted that the premium due that day was not paid; it admitted that said policy No. 8611895 was in force on July 1, 1934; it requested strict proof of the allegation that said Toucey stated to the officers and employees of the Kansas City branch office that he was totally disabled and had been so disabled since April, 1933, and requested strict proof that said Toucey requested said employees to analyze his policies and advise him of the coverage and what values existed therein at said time. Said answer denied that any of defendant's Kansas City branch office employees advised [fol. 19] Toucey fraudulently or advised him in the manner or to the effect stated in said petition; said answer stated that none of the employees of said branch office was an officer of defendant and none was authorized by defendant to advise policyholders on its behalf. The answer denied that defendant had received any letter from plaintiff written on August 11, 1934 and denied that it fraudulently failed to advise plaintiff of his rights or fraudulently induced plaintiff to reduce his insurance; it denied that defendant

was under any obligation to advise plaintiff with respect to the meaning or the legal effect of his policies or that it did so advise him. Said answer denied that plaintiff was wholly and permanently disabled since April, 1933 and denied that he was so totally disabled by disease that he was prevented thereby from engaging in any occupation whatsoever for remuneration or profit or that he was totally disabled for more than three consecutive months immediately before August 11, 1934, or that he gave defendant notice at its home office of such alleged total and permanent disability and denied that plaintiff was at the time said answer was filed still totally and permanently disabled. Said answer further stated that on July 31, 1934, plaintiff made written application to defendant New York Life Insurance Company for the reduction of its policy No. 8611895 from a face amount of Fifty Thousand Dollars ($50,000.00) to a face amount of Twenty-five Thousand Dollars ($25,000.00), with a corresponding reduction in all the other benefits thereunder; that said plaintiff Toucey further applied for the cash surrender value of certain other New York Life Insurance Company policies at about the same time and that said defendant paid him on August 7, 1934, the sum of Seven Hundred Seventeen and 31/100 [fol. 20] Dollars ($717.31), being the full cash surrender value of policy No. 10226440 and the sum of Four Hundred Thirty-six and 11/100 Dollars ($436.11), being the full cash surrender value of policy No. 10391096; that plaintiff Toucey accepted said sums and on September 26, 1934, said policy No. 8611895 was reduced as aforesaid; that thereafter and on October 2, 1934, a quarterly premium in the amount of Two Hundred Eighty-nine and 25/100 Dollars ($289.25) became due upon said policy No. 8611895; that on November 2, 1934, the last day of grace in which by the terms of said policy plaintiff was entitled to pay the premium thereon falling due on said October 2nd, plaintiff Toucey delivered to defendant his check for Two Hundred Eighty-nine and 25/100 Dollars ($289.25) which was deposited by defendant in the bank and was thereafter returned to defendant by the bank not honored, and that thereupon said policy lapsed for failure to pay said premium due October 2, 1934; that on November 21, 1934 de-

fendant sent said Toucey a letter enclosing said check and notified said Toucey that because said check had been returned by said bank not honored said policy had lapsed on the books of the company; that plaintiff never paid said premium and never reinstated said policy; that thereafter and on April 3, 1935, defendant New York Life Insurance Company at the request of the plaintiff Toucey paid him the sum of One Hundred Three and 46/100 Dollars ($103.46), being the cash surrender value of its policy No. 10533974. Defendant states that said answer reads in part as follows:

"9. Defendant further states that said policy No. 8611895 provides in part:

'And the Company Agrees to Pay to the Insured Five Hundred Dollars each month ($10 Per $1,000 of the face of this policy) during the lifetime of the Insured, and also to [fol. 21] waive the payment of premiums, if the Insured becomes wholly and presumably permanently disabled before age 60, subject to all the terms and conditions contained in Section 1 hereof.';

that Section 1 of said policy provides:

'Disability Benefits

1. Total Disability.—Disability shall be deemed to be total whenever the Insured is wholly disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit.

2. Permanent Disability.—Disability shall be presumed to be permanent,—(a) Whenever the Insured will presumably be so totally disabled for life; or—(b) After the Insured has been so totally disabled for not less than three consecutive months immediately preceding receipt of proof thereof.

3. Benefits.—Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally and presumably permanently disabled and that such disability occurred after the insurance under this Policy took effect and before its anniversary on which the Insured's age at nearest birthday is sixty years, the following benefits will be granted:

(a) Income Payments.—The Company will pay to the Insured a monthly income of $10 per $1,000 of the face of the policy during his lifetime and continued disability, beginning immediately on receipt of said proof. Any income payment due before the Company approves the proof of disability shall be payable upon such approval. If disability results from insanity, income payments under this section will be paid to the beneficiary in lieu of the Insured.

(b) Waiver of Premiums—The Company will waive payment of any premium falling due after approval of said proof and during such disability. Any premium due prior to such approval is payable in accordance with the terms of the policy, but if due after receipt of proof will, if paid, be refunded upon approval of proof.

4. In the event of default in payment of premium after the Insured has become totally disabled, the policy will be [fol. 22] restored upon payment of arrears of premium with interest at 5%, provided due proof that the Insured is totally and presumably permanently disabled, as herein defined, is received by the Company not later than six months after said default and the benefits under this section shall then be the same as if said default had not occurred.

5. It is further agreed that the total and irrecoverable loss of the sight of both eyes, or of the use of both hands or of both feet or of one hand and one foot shall be considered total and permanent disability.

6. Recovery from Disability.—The Company may from time to time demand due proof of the continuance of total disability, but not oftener than once a year after it has continued for two full years. Upon failure to furnish such proof, or if at any time it shall appear to the Company that the Insured is able to engage in any occupation for remuneration or profit, no further income payments shall be made nor premiums waived.

7. The sum payable in any settlement of the policy shall not be reduced by income payments made more by premiums waived under the above provisions. Dividends, loan and surrender values shall be the same as if the waived premiums had been duly paid. If any benefit under this

section is unpaid at the time of the Insured's death it shall be payable to the person entitled to the proceeds of the policy.

'8. These Disability Benefits will not apply if the disability of the Insured shall result from self-inflicted injury or from military or naval service in time of war.'

Defendant further states that by the aforesaid endorsement the amount of said monthly disability benefits was duly reduced to the sum of Two Hundred Fifty Dollars ($250.00) per month; that defendant never at any time while said policy was in force received from plaintiff any claim that plaintiff was entitled to disability benefits under said policy and never received from plaintiff at its home office before default in payment of premium due proof that [fol. 23] the insured was totally and presumably permanently disabled, and that such disability occurred after the insurance under this policy took effect and before its anniversary on which the insured's age at nearest birthday was 60 years; that plaintiff is not entitled to any of the relief prayed for in plaintiff's petition, and is not entitled to any disability benefits or any benefits whatever of any kind or character under said policy.

Wherefore, having fully answered plaintiff's petition, defendant prays that this suit be dismissed with prejudice and that defendant have its costs herein incurred and expended."

3. Defendant further states that thereafter and on or about the 25th day of May, 1936 Samuel R. Toucey filed his reply to defendant's answer in said equity cause No. 2810 and therein averred that said Toucey requested a complete analysis of his policies from L. C. Schellhorn, Cashier of the Kansas City branch office of the New York Life Insurance Company, and from M. M. McKenny and a Mr. Wells of said branch office and advised them of his total and permanent disability as alleged in his petition; that defendant company held out to plaintiff that said Cashier and said officers and agents had the authority to analyze insurance policies for coverage and give advice to policyholders thereon and receive communications oral and written from policyholders as to the physical condition and disability of such policyholders and that plaintiff Toucey

dealt with said persons with the understanding and belief that they had such authority and defendant was estopped by holding said persons out as having such authority to [fol. 24] assert that they do not have it. Said reply averred that plaintiff did furnish due proof of his total and permanent disability to defendant by two letters, one dated June 29, 1934 and one dated August 11, 1934, as alleged in his petition and that said letters constituted such due proof; that his oral statements to the said agents and employees of the Kansas City branch office advising them of his total and permanent disability existing prior to 1934 constituted such due proof and that defendant failed upon receipt of such due proof to request any further or additional proof of such disability; that defendant was estopped by failing to ask further proof of disability to assert that such due proof was not made. A copy of said reply is hereto attached, marked Exhibit "C", and by reference is made a part hereof.

4. Defendant states that thereafter the aforesaid cause came on for trial on the 18th day of November, 1936 before the Honorable Merrill E. Otis, District Judge, and that thereafter said trial was concluded on November 22, 1936 and on said day the Court rendered and entered a final decree ordering, adjudging and decreeing that plaintiff Toucey take nothing by his bill in this cause but that the same be and was thereby dismissed with prejudice at the plaintiff's costs. A copy of said decree, marked Exhibit "D" is hereto attached and by reference made a part hereof; that said decree by its terms made a part thereof the findings of fact and conclusions of law made by the Court in said cause; that by said decree this Court found and ruled that said policy number 8611895 had lapsed and was not and is not in force or effect, that said Toucey was not and had not been totally and permanently disabled as in said policy defined and limited, and that defendant had not been guilty of wrongful or fraudulent conduct which would entitle said Toucey to have said policy reinstated or to treat the same as in force.

[fol. 25] 5. Plaintiff further states that at the trial of said cause both said Toucey as plaintiff and New York Life Insurance Company as defendant offered testimony

upon the issue presented in said cause whether said Toucey was totally and permanently disabled within the meaning of the aforesaid policy from the month of April, 1933 to the date of trial, and that said Court in ruling that said Toucey was not so disabled weighed and considered and ruled upon said evidence.

6. That this Court at the close of the evidence in said cause delivered an opinion therein deciding this cause on the merits, a copy of which, marked Exhibit "E" is hereto attached and embodied herein and by reference made a part hereof; that in said oral opinion said Hon. Merrill E. Otis, Judge of this Court, expressly found and declared that said Toucey was not totally and permanently disabled within the meaning of said policy and said Court expressly made a finding of fact in said opinion and in said cause which by reference is made a part of the decree in said cause, which said finding of fact is as follows:

"I believe that it has not been proved that the plaintiff, within the meaning of this contract, is now or has been at the times alleged in the petition, wholly disabled by bodily injury or disease, so that he is prevented thereby from engaging in any occupation whatever for remuneration or profit, and I think the fact to be that he is not and has not been so disabled. That is finding of fact, I think, No. 2.

Plaintiff further states that the final decree of said Court in said cause was not appealed from or set aside or otherwise made the subject of attack in said cause and was and is a final, conclusive and binding adjudication and is res judicata of and on all of the issues raised or which could have been raised in said cause and particularly the issue whether said policy contract was in force and effect and [fol. 26] the issue whether said Toucey was or had been totally and permanently disabled within the meaning of said policy during and after the month of April, 1933, which said issues were raised and were in issue and were decided by the decree in said cause.

7. Defendant further states that on December 28, 1937 one James Shay commenced an action in the Circuit Court of Jackson County, Missouri, at Kansas City, numbered 457059 in the records of said Court entitled "James Shay,

Plaintiff, vs. New York Life Insurance Company, a corporation, defendant", by filing a petition in said Court, a copy of which, marked Exhibit "F" is hereto attached and hereby, by reference, made a part hereof; and in said petition said Shay alleges, among other things, that he is a citizen and resident of the State of Washington and that the defendant is a corporation existing under the laws of the State of New York; that defendant New York Life Insurance Company issued the policy of insurance No. 8611895 (hereinabove described) to Samuel R. Toucey on April 29, 1924; that said Toucey became wholly and presumably permanently disabled on the 1st day of April, 1933 while said policy was in full force and effect and thereafter while said policy was in full force and effect gave notice to defendant that he was so disabled; that said Toucey had paid all premiums due under said policy at all times mentioned in said petition and that the same was in full force and effect; that said Toucey "prior to the institution of this suit, has assigned all of his right, title and interest in and to any and all claims and demands under said contract of insurance to this plaintiff"; that there is due and payable under said policy by reason of the said permanent disability of said Toucey the sum of Twenty-eight Thousand Dollars ($28,000.00) for which demand has been made on defendant New York Life Insurance Company, which, without [fol. 26a] just cause or excuse, has failed to pay the same; that said company's refusal to pay said claim was and is vexatious. Said Shay prays judgment against defendant for Twenty-eight Thousand Dollars ($28,000.00) with interest and for Twenty-eight Hundred Dollars ($2800.00) for a penalty for vexatious refusal to pay and for the sum of Ten Thousand Dollars ($10,000.00) as a reasonable attorneys' fee and costs. Defendant further states that said cause is returnable to the March, 1938 Term of the Circuit Court convening on March 14th.

8. Defendant further states that if said assignment was made by said Toucey to said Shay the same was made without consideration and wholly and solely for the purpose and with the object of avoiding and defeating the jurisdiction of this Court, and for the purpose and with the object of nullifying the decree of this Court by securing a readjudication in the State Court of the issues presented and

adjudged herein, and that said assignment was and is purely colorable and is a sham and pretext to evade the jurisdiction and the decree of this Court by indirection; that said assignment is a fraud upon this Court and upon this defendant; that if said assignment had not been made and if said suit in the Circuit Court of Jackson County, Missouri, had been brought by said Toucey in his own name said suit would have been removable to and would have been removed to this Court on the grounds of diversity of citizenship; that said assignment was made to defeat the decree and adjudication of this Court, and in defiance and violation thereof and to defeat such removal, and is a result of a collusive and fraudulent plan and agreement between said Toucey and said Shay and is part of a plan, scheme and devise to secure a new adjudication by the Missouri State Courts upon a matter which has already been fully adjudicatd by this Court and to avoid the effect of [fol. 27] the rule of res judicata and to inflict penalties upon this defendant unjustly and inequitably and to collect attorneys' fees, all founded upon a false allegation that this defendant had vexatiously refused to pay the sums which said Shay claims to have demanded from it. Defendant further states that the rights, cause of action and chose in action alleged in said petition to have been assigned to said Shay and sought to be enforced by him in said State Court action are in substance and fact the same identical cause of action, the same rights and the same chose in action sought by said Toucey to be enforced and recovered on in this action, and ruled upon, barred and foreclosed by the decree of this Court aforesaid.

9. Defendant further states that defendant has no adequate remedy at law; that if this Court does not grant relief by a supplemental decree herein defendant will be subjected to a multiplicity of suits and to great expense and harassment and will be required to devote much time and labor to the defense of said suit in said State Court and will be subjected to the attempt to mulct and defraud it hereinabove mentioned and suffer an irreparable injury.

Wherefore, defendant prays the Court to determine and adjudge that the purported and pretended rights attempted to be asserted by the aforesaid Shay in said State Court

suit were finally determined and adjudicated by this Court in the final decree in this case hereinabove mentioned and to determine and declare the said decree to be res judicata upon the rights of the aforesaid Shay in said suit and to order and direct said Toucey to revoke and rescind the aforesaid pretended assignment to said Shay and to order the said Toucey to cause his attorneys, Cornelius Roach, Jr. and M. W. Borders, Jr., who are purporting and pretending to act for said Shay in said State Court suit, while [fol. 28] they are in truth and fact really acting for said Toucey, forthwith to dismiss said State Court case and to make an order that a writ of injunction issue out of and under the seal of this Court restraining and enjoining said Toucey, either in his own name or in the name of any other person as a pretended or purported assignee or as an assignee for the benefit of said Toucey, from bringing or prosecuting any suit or suits in any court or courts, or committing any other act or acts, for the purpose, or having the effect of seeking, a readjudication of the issues adjudged by the aforesaid decree of this Court herein and from making any further such assignment or assignments to any person or persons whomsoever of his purported and pretended right to disability benefits, or to any other benefits under New York Life Insurance Company policy No. 861895, and that this Court issue, or cause to be issued, a restraining order and, upon hearing, a preliminary injunction against said Toucey and his said attorneys for the purpose and to the effect aforesaid; and for such other and further relief as the Court may deem equitable and proper in the premises.

GEORGE J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Solicitors for Defendant,
New York Life Insurance Company.

State of Missouri,
County of Jackson.—ss.:

Richard S. Righter, being duly sworn, upon his oath states that he is an agent and solicitor for New York Life Insurance Company and states that the matters and facts [fol. 29] set forth in the above supplemental bill in equity

are true, and further states that Exhibits "A", "B", "C", "D", "E" and "F" attached to said bill are true copies.

RICHARD S. RIGHTER.

Subscribed and sworn to before me this 10th day of March, 1938.

MILDRED L. POWERS,
Notary Public, Jackson County,
(Seal) State of Missouri.

My commission expires, September 7, 1941.

Filed in the United States District Court Mch. 10, 1938.

[fol. 30] Exhibit "A".

Petition.

In the Circuit Court of Jackson County, Missouri, at Kansas City.

January Term, 1936.

Samuel R. Toucey, Plaintiff,
No. 443457. vs.
New York Life Insurance Company, a corporation, Defendant.

I.

Comes plaintiff in the above entitled cause and for his cause of action herein states that the defendant is a mutual life insurance company organized and existing under the laws of the state of New York and authorized to do business in the state of Missouri, with a branch office of said company located in Kansas City, Jackson County, Missouri, and as such mutual life insurance company the defendant is authorized and empowered to write insurance policies upon the lives of individuals, providing for the payment of certain sums upon their death or disability, and as such said defendant is liable to suit in the courts of this state.

II.

Plaintiff further states that on the 2nd day of January, 1924, the defendant issued its life insurance policy

#8 611 895 on the life of plaintiff herein by which it agreed to pay plaintiff's beneficiary a death benefit of Fifty Thousand Dollars ($50,000.00) and the sum of Five Hundred Dollars ($500.00) each month during the lifetime of the plaintiff, and also to waive the payment of premiums on said policy if said plaintiff became wholly and presumably [fol. 31] permanently disabled before the age of sixty years by bodily injury or disease, so that he would be thereby prevented from engaging in any occupation for remuneration or profit in case such disability occurred after said policy took effect and before the anniversary at which plaintiff's age at the latest birthday was sixty years; that plaintiff upon delivery of said policy paid a premium of Two Thousand, One Hundred Eighty-two Dollars ($2,182.00) in advance and paid all premiums on said policy until the quarterly premium due on October 2, 1934, which was not paid for the reasons hereinafter set out.

III.

Plaintiff further states that on or about the 1st of July, 1934, and while the aforesaid policy of insurance was in full force and effect, plaintiff had other life insurance with the defendant company, being policies #10 226 440, #10 391 696 and #10 533 974, which, together with the above policy #8 611 895 for the sum of Fifty Thousand Dollars ($50,000.00), provided for One Hundred Thousand Dollars ($100,000.00) death benefits; that on or about the 1st of July, 1934, plaintiff consulted the Treasurer and other agents and employees of the branch office of the New York Life Insurance Company in Kansas City, Missouri, about his life insurance policies with said company, informing said officers and employees at that time that he was totally disabled and had been since April, 1933, because of an operation for stomach ulcers; that he could not work and on that account could not pay the premiums on all the aforesaid life insurance policies, and asked said officers and employees of the defendant company to analyze said policies and advise him as to the coverage of all of his policies with said company, and what values existed in said policies at that time; that the officers, employees and [fol. 32] agents of said Kansas City branch office of the defendant company, although being theretofore advised as to

plaintiff's physical condition, fraudulently advised plaintiff that if he would surrender the three policies number 10 226 440, 10 391 096, and 10 533 974, and reduce the death benefits of his policy #8 611 895 from Fifty Thousand Dollars ($50,000.00) to Twenty-five Thousand Dollars ($25,000.00), with a corresponding reduction in the premium and monthly payment of disability benefits from Five Hundred Dollars ($500.00) per month to Two Hundred Fifty Dollars ($250.00) per month, he would receive approximately Eleven Hundred Fifty Dollars ($1150.00) in cash, and that there would be sufficient values left in said policy #8 611 895 as so reduced to carry such reduced policy until the 2nd of January, 1935.

IV.

Plaintiff further states that after being advised as aforesaid by the officers, employees and agents of the branch office of the defendant company at Kansas City, Missouri, that he would receive approximately Eleven Hundred Fifty Dollars ($1150.00) upon the cancellation of said three numbered policies aforesaid, and the reduction of policy #8 611 895, as aforesaid, on the ..... day of August, 1934, he received notice from said branch office of the defendant company in Kansas City that a mistake had been made in computing his benefits under all of said policies; that instead of the company owing him about Eleven Hundred Fifty Dollars ($1150.00), he would owe the company Two Hundred Thirty-four Dollars ($234.00), and not knowing his rights in the premises, and not knowing whether this advice was correct or not, he paid under protest the quarterly payment due on the 2nd of July, 1934, on said policy #8 611 895. That plaintiff, realizing and believing that [fol. 33] he could not rely upon information received from the branch office of the New York Life Insurance Company wrote the home office of the defendant company in the City of New York, on August 11, 1934, notifying and advising said home office that he had spent several months trying to find out just what his policies were worth, and had found that the advice given him by the Kansas City Office was wrong, and that he desired of the home office that a complete analysis of his four policies be made for coverage and values and that he be advised his exact status and rights under said insurance. He also notified said company

at the same time in writing, while said policy #8 611 895 was in full force and effect, that he was totally disabled and could not work; that his income had ceased and if his insurance was cancelled he could not secure other insurance because of his physical condition; that he had been operated on in April, 1933, for stomach ulcers. That, although this defendant was so notified, said defendant fraudulently failed to advise this plaintiff that if he was totally disabled by disease, his policy provided for certain disability benefits because of such disease, defendant knowing and being advised in writing that plaintiff did not know his rights under said policy and the coverage thereof, and was asking defendant company for advice as to the coverage of said policy, and the defendant knowing that plaintiff was ignorant of his rights under said policy, and knowing that plaintiff was totally disabled and had been since April, 1933, and defendant knowing that plaintiff was unable to work and could not pay the premiums on his insurance policies, and knowing that the plaintiff had been wrongfully advised as to his rights under his policies by the officers and agents of said defendant company's branch office in Kansas City, Missouri, and knowing that at the time said policy #8 611 895 was issued to plaintiff, in the year 1924, plaintiff was then of the age of forty-five years, and knowing that plaintiff was of the age of fifty-five years at [fol. 34] the time it received notice of his total disability, it fraudulently and intentionally failed to advise the plaintiff of his rights under said policy #8 611 895, and fraudulently induced the plaintiff to reduce said insurance from a principal sum of Fifty Thousand Dollars ($50,000.00) to Twenty-five Thousand Dollars ($25,000.00), and fraudulently reduced the disability benefits thereof from Five Hundred Dollars ($500.00) per month to Two Hundred Fifty Dollars ($250.00), per month, and that because of said actions by defendant and its fraudulent failure and refusal to advise plaintiff of his rights under said policy, plaintiff was led by the conduct and actions and silence of the defendant, as aforesaid, to make said reductions in said policy, as aforesaid, and because of said facts as herein alleged, plaintiff acted to his irreparable injury and defendant is now estopped to claim or assert that due proof was not made on August 11, 1934, of total and permanent disability as provided by the terms of said policy.

V.

Plaintiff further states that at the time said defendant company attempted to reduce said policy, said defendant knew, by written notice dated June 29, 1934, that plaintiff was totally and permanently disabled, and knew that the contingent rights of plaintiff to disability benefits and waiver of premiums under the terms of said policy had then become fixed liabilities of the defendant company, and well knew that the plaintiff was ignorant of his rights under said policy, fraudulently reduced same, as aforesaid, without any consideration whatever for said reduction, and that said reduction of said policy both as to death and disability benefits was wholly without consideration and fraudulent and void as aforesaid.

VI.

Plaintiff further states that in September, 1935, and a few days after being advised by a medical examiner that [fol. 35] his policy covered disability benefits for disease, plaintiff made oral demand upon the defendant company at its branch office in Kansas City for the payment of disability benefits, and the reinstatement of his policy #8 611 895, which defendant had unlawfully cancelled because of the alleged failure to pay the premium due on October 2, 1934, thereon, but that defendant failed and refused on September 26, 1935, to reinstate said policy so unlawfully cancelled and to pay any disability benefits thereunder, for the reason stated in its written notice to the Kansas City branch office of the New York Life Insurance Company that due proof had not been given within six months after the cancellation of such policy, although this defendant well knew that in June and August, 1934, and while said policy was in full force and effect, it had received written notice of the total disability of plaintiff by disease, and his inability to pay premiums on said policies, and defendant well knowing that plaintiff was then under the age of sixty years, and that said disability benefits had continued for more than three months, and well knowing that said policy provided for the waiver of premiums and the payment of monthly benefits so long as said total disability should continue, and well knowing that the plaintiff did not know of his rights under said pol-

icy, and well knowing that plaintiff had asked for an analysis of his policies of the defendant company at its home office in New York City, knowingly and fraudulently and intentionally failed and refused to advise plaintiff as to his rights, and failed and refused to advise him that said policy would be kept in force by the waiver of premiums if he was totally disabled, and misled the plaintiff to his irreparable injury, and unlawfully and fraudulently cancelled said policy #8 611 895, although plaintiff has paid defendant in premiums on said policy approximately Twenty-two Thousand Dollars ($22,000.00).

[fol. 36] VII.

Plaintiff further states that he faithfully and fully performed all the terms and conditions of said policy, and that he was wholly and presumably permanently disabled before reaching the age of sixty years and has been since April, 1933, when he was fifty-four years of age, and that he was so totally and wholly disabled by disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit, and that he was so totally disabled for more than three consecutive months immediately before August 11, 1934, when he gave the defendant company at its home office in the City of New York notice of such total and permanent disability by disease, and that he is still totally and permanently disabled, and that said policy #8 611 895 was in full force and effect when his disability as aforesaid was incurred, and that he was so disabled as aforesaid on August 11, 1934, while said policy was in full force and effect and before any default in the payment of the October, 1934, premium thereon; that although defendant knew of such disability and that plaintiff was wholly disabled by disease, as aforesaid, on and for many months before August 11, 1934, and knowing that plaintiff at the time of his disability was under the age of sixty years, and knowing that said policy, at the time defendant received written notice at its home office in New York of such disability, was in full force and effect, and knowing that plaintiff was asking the officials, officers and agents of the defendant company at its home office in New York to advise him as to the coverage of said policy and his rights thereunder, that said defendant fraudulently and wilfully failed and refused to advise the

plaintiff, although it was its duty so to do, but on the contrary led plaintiff to believe that his only rights under said policy were to either pay the premiums thereon or to carry the same as long as it could be carried as extended insurance, and thereby misled the plaintiff, to his irreparable damage.

[fol. 37] Plaintiff further states that because of the foregoing, he is entitled under the facts herein alleged to have the attempted reduction of his policy #8 611 895 set aside and for naught held, and to have the attempted cancellation of said policy adjudged to be of no force and effect, and that he is entitled to recover of defendant disability benefits under said policy as provided for therein from August 11, 1934, and for the waiver of premiums on said policy so long as plaintiff is totally and permanently disabled because of disease.

VIII.

Wherefore, plaintiff prays that said policy #8 611 895 of the defendant company be adjudged to be in full force and effect, and that said policy be reinstated and that the attempted reduction thereof as of July 2, 1934, be declared to be null and void, and that the premiums thereon be declared waived by the defendant company because of the total and permanent disability of the plaintiff for such time that such disability shall continue, and further prays for the recovery of the sum of Five Hundred Dollars ($500.00) for diability benefits per month from August 11, 1934, and for return of the said premium paid for the quarter beginning July 2, 1934, and for interest on each of these sums at the rate of six per cent. (6%) per annum, and plaintiff prays for such other and further relief as to the court seems meet and equitable and for the costs of this suit.

CHAS. M. HOWELL,
CHAS. M. HOWELL, JR.,
WM. H. ALLEN,
SCOTT R. TIMMONS,
Attorneys for Plaintiff.

[fol. 38] Exhibit "B".

Answer and Motion to Dismiss.

In the District Court of the United States for the Western Division of the Western District of Missouri at Kansas City.

November Term, 1935.

Samuel R. Teucey, Plaintiff,
No. 2810. vs. In Equity.
New York Life Insurance Company, a Corporation, Defendant.

Motion to Dismiss.

Comes now defendant in the above entitled cause and moves the Court to dismiss said cause on the ground and for the reason that plaintiff's petition herein does not state facts sufficient to constitute a cause of action against this defendant and does not state facts sufficient to entitle the plaintiff to the relief prayed for in said petition.

Wherefore, defendant prays that said cause be dismissed and that defendant have its costs herein incurred and expended.

Answer.

Comes now defendant in the above entitled cause and for its answer to plaintiff's petition states:

1. Answering the first paragraph of said petition, the defendant admits all of the allegations therein contained.

2. Answering paragraph 2 of said petition, defendant admits that on January 2, 1924 defendant issued its policy of life insurance No. 8611895 on the life of plaintiff; admits [fol. 39] that the terms thereof are in part substantially as set forth in said paragraph 2. Defendant denies that plaintiff paid all premiums on said policy until the quarterly premium due October 2, 1934, but admits that the premium due that day was not paid.

3. Answering paragraph 3, defendant admits that said policy No. 8611895 was in force and effect on the first day of July, 1934; admits that plaintiff had other insurance

with defendant, being policies Nos. 10226440, 10391096 and 10533974, and admits that the sum or face amount of all four of said policies was One Hundred Thousand Dollars ($100,000.00). Defendant denies that on or about July 1, 1934, plaintiff consulted the "treasurer" of the branch office of defendant in Kansas City, Missouri, about his life insurance, and states that no person with the title of "treasurer" is employed in said office; that defendant is without knowledge what other employees of said branch office were consulted by plaintiff, and defendant is without knowledge what plaintiff said to said employees, but defendant states that defendant cannot discover any employee of said branch office to whom plaintiff stated that he was totally disabled and had been since April, 1933 because of an operation for stomach ulcers, or to whom he stated that he could not work and on that account could not pay the premiums on all the aforesaid life insurance. Defendant therefore requests that strict proof of said allegations be required, and that plaintiff be required to state in his petition the names of the employees to whom he claims to have made the statements mentioned in paragraph 3 of said petition. Defendant is without knowledge whether plaintiff stated to any employee of said branch office, and to what, if any, such employee plaintiff stated that plaintiff wished defendant to analyse his policies and advise him as to the coverage of all of his policies issued by defendant, [fol. 40] and what values existed in said policies at that time. Defendant asks that strict proof of said allegation be required. Defendant denies that any of the employees in defendant's Kansas City branch office advised plaintiff fraudulently, and denies that said employees advised plaintiff in the manner or to the effect stated in said paragraph 3.

Further answering said paragraph 3, defendant states that none of the employees of said branch office is an "officer" of defendant, and that none of said employees is, or was at the time mentioned in said paragraph 3, authorized by defendant to advise policy holders on its behalf or in its name with respect to the meaning and legal effect of its policies, or to advise plaintiff in the manner or to the effect alleged in said paragraph 3; that any such advice to plaintiff, if given, was not and is not binding on this defendant.

4. Answering paragraph 4 of plaintiff's petition, defendant states that it is without knowledge what notice plaintiff received from said branch office, or what mistake said branch office had made in computing plaintiff's benefits under said policies, but denies that plaintiff paid under protest the quarterly premium due on the second of July, 1934 on policy No. 8611895, and states that, even if made, such protest would have been without effect in law. Defendant denies that it received any letter whatsoever from plaintiff written on August 11, 1934, and denies that it fraudulently failed to advise the plaintiff of his rights under said policy No. 8611895, and denies that it fraudulently induced the plaintiff to reduce his insurance from Fifty Thousand Dollars ($50,000.00) to Twenty Five Thousand Dollars ($25,000.00), or fraudulently reduced the disability benefits from Five Hundred Dollars ($500.00) per month to Two Hundred and Fifty Dollars ($250.00) per month. Defendant states that it was under no obligation whatsoever to advise plaintiff with respect to the meaning and legal effect of his said policy or policies and [fol. 41] denies that it did so advise him. Defendant denies that it is estopped to claim that due proof was not made of total and permanent disability as required by the terms of said policy No. 8611895.

5. Answering paragraph 5 of said petition, defendant denies that it knew by written notice dated June 29, 1934 that plaintiff was totally and permanently disabled, and states that it never received any such notice, and denies each and every other allegation in paragraph 5 of said petition contained.

6. Answering paragraph 6 of said petition, defendant denies that plaintiff made oral demand upon defendant's branch office for the payment of disability benefits and the reinstatement of policy No. 8611895, and denies that any such oral demand made by plaintiff upon said branch office would be, or was, binding upon this defendant, and states that plaintiff was not entitled to any sum or sums whatever from defendant for disability benefits under said policy No. 8611895, and denies that defendant unlawfully cancelled said policy, and states that on the contrary, said policy lapsed for failure to pay a premium or premiums

due thereon; defendant states that plaintiff was not entitled to have said policy reinstated on September 26, 1935, and denies that defendant knowingly and fraudulently and intentionally failed and refused to advise plaintiff as to his rights, and states that defendant was under no legal duty or obligation to advise plaintiff of his rights with respect to the matters set forth in said Count, and denies each and every other allegation contained in said paragraph 6.

7. Answering paragraph 7, defendant denies that plaintiff faithfully and fully performed all the terms and conditions of said policy, and denies that he was wholly and presumably permanently disabled since April, 1933, and de- [fol. 42] nies that he was so totally disabled by disease that he was prevented thereby from engaging in any occupation whatsoever for remuneration or profit, and denies that he was totally disabled for more than three consecutive months immediately before August 11, 1934, and denies that on that day he gave defendant notice at its home office of such alleged total and permanent disability, and denies that plaintiff is still totally and permanently disabled, and denies that defendant knew that plaintiff was so disabled on and for many months before August 11, 1934, and denies that defendant fraudulently and wilfully failed and refused to advise plaintiff, and denies that it was defendant's duty to advise plaintiff, and denies that defendant led plaintiff to believe that his only rights under said policy were to pay the premiums thereon or carry the same as long as it could be carried as extended insurance, and denies that it misled plaintiff to his irreparable damage, and denies that plaintiff is entitled to have the alleged reduction of policy No. 8611895 set aside and for naught held, and to have the attempted cancellation of said policy adjudged to be of no force and effect, and denies that plaintiff is entitled to recover any disability benefits under said policy whatsoever.

8. Further answering said petition, defendant states that on August 7, 1934 plaintiff made written application to defendant for the payment of the cash surrender value of New York Life Insurance Company policy No. 10226440; that on August 13, 1934 plaintiff made written application to defendant for the payment of the cash surrender value of New York Life Insurance Company policy No. 10391096;

that on July 31, 1934 1934 plaintiff made written application to defendant for the reduction of New York Life Insurance Company policy No. 8611895 from the face amount of Fifty Thousand Dollars ($50,000.00) to a face amount of Twenty Five Thousand Dollars ($25,000.00) with the corresponding reduction in all of the other benefits there- [fol. 43] under; that pursuant to said applications, defendant paid to plaintiff on August 7, 1934, the sum of Seven Hundred Seventeen Dollars and Thirty One Cents ($717.31). being the full cash surrender value of policy No. 10226440, and the sum of Four Hundred Thirty Five Dollars and Eleven Cents ($435.11), being the full cash surrender value of policy No. 10391096; that plaintiff thereupon accepted said sums as and for the cash surrender value of said policies and surrendered said policies to this defendant to be cancelled; that thereafter and on September 26, 1934, pursuant to plaintiff's application and request, defendant duly endorsed upon policy No. 8611895 the reduction of the face amount thereof to Twenty Five Thousand Dollars ($25,000.00) and the reduction of the amount of the other benefits in said policy to one-half thereof, including the reduction of the amount of disability benefits payable under said policy in the event of total and permanent disability, as in said policy defined, from the sum of Five Hundred Dollars ($500.00) per month to the sum of Two Hundred and Fifty Dollars ($250.00) per month; that thereafter and on October 2, 1934, a quarterly premium in the amount of Two Hundred Eighty Nine Dollars and Twenty Five Cents ($289.25) became due upon said policy No. 8611895; that on November 2, 1934, being the last of the days of grace in which by the terms of said policy plaintiff was entitled to pay the premium thereon falling due on said October 2, plaintiff delivered to defendant his check drawn on the Commerce Trust Company for the sum of Two Hundred Eighty Nine Dollars and Twenty Five Cents ($289.25); that said check was deposited by defendant in The First National Bank of Kansas City for collection and thereafter was returned to defendant by said bank not honored; that thereupon said policy No. 8611895 lapsed for failure to pay said premium due October 2, 1934; that on November 21, 1934, defendant sent a letter to plaintiff and enclosed said check in said letter and notified [fol. 44] plaintiff that because said check had been returned

by the bank not honored, plaintiff's policy had been lapsed on the books of the company, and urged the plaintiff, on receipt of said letter, to apply for the reinstatement of said policy on the enclosed form and to return it to defendant with the sum of Two Hundred Ninety One Dollars and Twenty Five Cents ($291.25), being the amount of the premium due October 2, 1934, plus accrued interest, all for the purpose of having said policy reinstated if plaintiff elected to reinstate said policy; that defendant also attached to said letter a medical examination form to be completed by one of the company's approved examiners as a part of the process of reinstating said policy; that plaintiff never paid said premium due October 2, 1934 and never took the steps necessary for the reinstatement of said policy, and said policy lapsed and has ever since been void for failure to pay said premium; that thereafter and on the third day of April, 1935, defendant, at the request of plaintiff, duly paid to plaintiff the sum of One Hundred Three Dollars and Forty Six Cents ($103.46), being the cash surrender value of New York Life Insurance Company policy No. 10533974; that said sum was received and was accepted by plaintiff, who thereupon surrendered said policy to defendant and the same was thereupon cancelled.

9. Defendam further states that said policy No. 8611895 provides in part:

"And the Company Agrees to Pay to the Insured Five Hundred Dollars each month ($10 Per $1,000 of the face of this policy) during the lifetime of the Insured, and also to waive the payment of premiums, if the Insured becomes wholly and presumably permanently disabled before age 60, subject to all the terms and conditions contained in Section 1 hereof."

that section 1 of said policy provides:

"Disability Benefits

1. Total Disability.—Disability shall be deemed to be total whenever the Insured is wholly disabled by bodily [fol. 45] injury or disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit.

2. Permanent Disability.—Disability shall be presumed to be permanent,—(a) Whenever the Insured will presumably be so totally disabled for life; or—(b) After the Insured has been so totally disabled for not less than three consecutive months immediately preceding receipt of proof thereof.

3. Benefits.—Upon receipt at the Company's Home Office, before default in payment of premium, of due proof that the Insured is totally and presumably permanently disabled and that such disability occurred after the insurance under this Policy took effect and before its anniversary on which the Insured's age at nearest birthday is sixty years, the following benefits will be granted.

(a) Income Payments.—The Company will pay to the Insured a monthly income of $10 per $1,000 of the face of the policy during his lifetime and continued disability, beginning immediately on receipt of said proof. Any income payment due before the Company approves the proof of disability shall be payable upon such approval. If disability results from insanity, income payments under this section will be paid to the beneficiary in lieu of the Insured.

(b) Waiver of Premiums.—The Company wil waive payment of any premium falling due after approval of said proof and during such disability. Any premium due prior to such approval is payable in accordance with the terms of the policy, but if due after receipt of proof will, if paid, be refunded upon approval of proof.

4. In the event of default in payment of premium after the Insured has become totally disabled, the policy will be restored upon payment of arrears of premium with interest at 5%, provided due proof that the Insured is totally and presumably permanently disabled, as herein defined, is received by the Company not later than six months after said default and the benefits under this section shall then be the same as if said default had not occurred.

5. It is further agreed that the total and irrecoverable loss of the sight of both eyes, or of the use of both hands

or of both feet or of one hand and one foot shall be considered total and permanent disability.

6. Recovery from Disability.—The Company may from time to time demand due proof of the continuance of total disability, but not oftener than once a year after it has continued for two full years. Upon failure to furnish such proof, or if at any time it shall appear to the Company that the Insured is able to engage in any occupation for remuneration or profit, no further income payments shall be made nor premiums waived.

7. The sum payable in any settlement of the policy shall not be reduced by income payments made nor by premiums waived under the above provisions. Dividends, loan and surrender values shall be the same as if the waived premiums had been duly paid. If any benefit under this section is unpaid at the time of the Insured's death it shall be payable to the person entitled to the proceeds of the policy.

8. These Disability Benefits will not apply if the disability of the Insured shall result from self-inflicted injury or from military or naval service in time of war."

[fol. 46] Defendant further states that by the aforesaid endorsement the amount of said monthly disability benefits was duly reduced to the sum of Two Hundred Fifty Dollars ($250.00) per month; that defendant never at any time while said policy was in force received from plaintiff any claim that plaintiff was entitled to disability benefits under said policy and never received from plaintiff at its home office before default in payment of premium due proof that the insured was totally and presumably permanently disabled, and that such disability occurred after the insurance under this policy took effect and before its anniversary on which the insured's age at nearest birthday was 60 years; that plaintiff is not entitled to any of the relief prayed for in plaintiff's petition, and is not entitled to any disability benefits or any benefits whatever of any kind or character under said policy.

Wherefore, having fully answered plaintiff's petition, defendant prays that this suit be dismissed with prejudice and that defendant have its costs herein incurred and expended.

GEORGE J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Attorneys for Defendant.

[fol. 47] Exhibit "C".

Reply.

In the District Court of the United States For the Western Division of the Western District of Missouri at Kansas City.

April Term, 1936.

Samuel R. Toucey, Plaintiff,
No. 2810. vs. In Equity.
New York Life Insurance Company, a corporation, Defendant.

Comes now plaintiff herein and in reply to the answer of defendant states:

1. In reply to the allegations of paragraph 3 of defendant's answer, plaintiff states that he conferred with L. C. Schellhorn, cashier of the branch office of the New York Life Insurance Company, of Kansas City, Missouri, and Mr. M. M. McKenny of said branch office and a Mr. Wells of said branch office and other employees and agents thereof whose names he does not now recall prior to July 1, 1934, concerning his life insurance with said New York Life Insurance Company and requested a complete analysis of his policies and advised said agents, servants and employees of said New York Life Insurance Company of his total and permanent disability as alleged in plaintiff's petition. And in further reply to said paragraph 3 states that the defendant, New York Life Insurance Company, held out to plaintiff that said cashier and said officers and agents aforesaid had the authority to analyze insurance policies for coverage and to give advice to policyholders thereon and to receive from policyholders communications, both written and

oral, as to the physical condition and disability of such policyholders and that the plaintiff dealt with said cashier and officers and agents aforesaid with the understanding and belief that they had the authority to so advise and inform [fol. 48] plaintiff and that the defendant is estopped, by holding out to plaintiff that said cashier and other officers and employees of its branch office of Kansas City, Missouri, had the authority to analyze policies and advise policyholders thereon, to now assert that said cashier and said agents and employees had no such authority, if in fact they had no such actual authority, which latter fact plaintiff denies.

2. Further answering paragraph 9 of defendant's answer, plaintiff admits that said policy No. 8611895 contains the provisions quoted from said policy and set out in paragraph 9 and further replying, denies that plaintiff did not furnish due proof to the home office of defendant company of his total and permanent disability while said policy was in force but avers that by letter of June 29, 1934, and by letter of August 11, 1934, as alleged in plaintiff's petition, that said plaintiff advised said defendant company at its home office in New York that he was totally disabled and had been since his operation for ulcer early in the year 1933 and by said letters advised said company that he was out of work and could not work because of his physical condition and could earn no money to pay premiums because of such disability and that he could not take out new insurance because of such condition and requested an analysis of his policies for coverage and that such letters constituted due proof of his total and permanent disability under the terms of said policy and that also his oral statements to the officers, agents and employees of the branch office of defendant company in Kansas City, Missouri, as aforesaid, advising of his total and permanent disability and that same had existed prior to 1934 constituted due proof of said total and permanent disability and further alleges that said company upon receipt of such due proof did not request any further or additional proof or did not advise the plaintiff that he should make any further formal proof of his total and permanent disability and is now estopped by its conduct as aforesaid and by its silence as alleged in plaintiff's [fol. 49] petition from now asserting or claiming that due

proof was not made by plaintiff of his total and permanent disability even if the matters aforesaid should not constitute due proof of such as provided by the terms of said policy.

Further replying, plaintiff denies each and every other allegation of new matter contained in defendant's answer.

Wherefore, having fully replied to defendant's answer, plaintiff prays for relief as in his petition herein.

Attorneys for Plaintiff.

[fol. 50] Exhibit "D".

Decree.

In the District Court of the United States For the Western Division of the Western District of Missouri, at Kansas City.

Samuel R. Toucey, Plaintiff,
No. 2810. vs. In Equity.
New York Life Insurance Company, a Corporation, Defendant.

Now on this day, the above entitled cause coming on to be heard before the court on the 18th day of November, 1936, upon the pleadings, the evidence, and the argument of counsel, and the hearing of said cause having extended to this date, and the court having duly heard and considered the evidence and the argument of counsel, the court finds that plaintiff is not entitled to the relief prayed for in plaintiff's petition and bill in equity herein. The court hereby makes a part hereof the findings of fact and conclusions of law made by the court herein.

Wherefore, it is by the court hereby Ordered, Adjudged, and Decreed, that plaintiff take nothing by his bill herein, but that the same be, and is hereby, dismissed with prejudice at the plaintiff's costs.

MERRILL E. OTIS,
Judge.

Dated at Kansas City, Missouri, this 22 day of November, 1936.

[fol. 51] Exhibit "E".

(Opinion.)

The Court: The argument in this case has now been concluded and the case is to be decided. During the trial of the case, which has continued for several days—this is the fourth day of the trial—I have had opportunity to consider such legal questions as were presented. I have been aided in considering those legal questions by the argument of counsel. I have never thought there was any good reason for delaying the decision of a case tried to the Court, either a law case or an equity case, unless it was found that there were problems of such difficulty as that time should be given to their consideration. If this were a law case and tried to a jury, of course, it would be necessary for the Court to pass upon the issues of law and to submit the case at once to the jury for the decision of the issues of fact. An equity case and a jury waived law case should be decided with equal expedition if it is possible to do so.

It is possible to decide this case now, to decide both such issues of law as require decision and such issues of fact as require decision. I may say that I intend to decide only such issues of law and issues of fact as do require decision in order that the case may be decided.

I begin this oral opinion, after the introductory remarks thus made, by saying that there are certain facts about which there is no controversy, which may be stated now. The plaintiff in this case, Major Samuel R. Toucey, had a contract of insurance with the defendant. It has been offered in evidence as Plaintiff's Exhibit 1. The number of that contract or policy, as it is generally called, was 8,611,895. It provided for the payment of $50,000 to the

beneficiary upon due proof of the death of the insured while [fol. 52] the policy was in full force and effect; for the payment of $100,000 as double indemnity upon due proof that his death resulted directly and independently of all other causes from bodily injury effected solely through accidental cause (with other requirements) and it provided for the payment of $500 per month by way of disability benefits if the insured should be wholly and permanently disabled before the age of 60 (with certain other requirements).

That policy was issued, that contract was entered into, January 2, 1924. On September 26, 1934, the plaintiff surrendered that policy voluntarily and took back the same policy, as I understood it, but with a provision that the principal amount to be paid upon his death should be $25,000 instead of $50,000, with corresponding reductions in the other indemnities provided for in the policy.

Concerning the facts I have thus far stated there is no controversy. It is contended by the plaintiff, and that contention is embodied in his bill in this proceeding, that on September 26, 1934, and before and after that time, he was totally and permanently disabled, that the defendant induced him by fraud to consent to the surrender of what I shall speak of as the $50,000 policy, and to the substitution of what I shall speak of as the $25,000 policy (although I understand that there was not actually a substitution of one policy for another, but a modification of the indemnities provided for in the $50,000 policy) and that since he was induced to surrender the $50,000 policy by the fraud of the defendant, he is entitled to have the result of that fraud set aside, and, in effect, to have reinstated the $50,000 policy.

If the $50,000 policy is reinstated then as further relief in this litigation, the plaintiff seeks to recover under the so reinstated policy upon the theory that he was totally and permanently disabled while it was still in full force and effect, that is, that at the time of the substitution and ever [fol. 53] since has been totally and permanently disabled and therefore is entitled to a waiver of any premiums from the date he became totally and permanently disabled, and to the indemnity provided for in the policy for total and permanent disability. Of course, the plaintiff does not ask

in this proceeding this pecuniary relief unless he is first granted that upon which it depends, that is to say, the reinstatement of the $50,000 policy.

What is the fraud which the plaintiff alleges was committed by the defendant on account of which he is entitled to the reinstatement of the $50,000 policy? As I understand it, his contention is that under the facts and circumstances disclosed in evidence in this case, it was the duty of the defendant to advise him that the $50,000 policy contained a provision entitling him to a $500 monthly indemnity for total and permanent disability; that the defendant, although asked by the plaintiff for advice as to the coverage of that policy, concealed from the plaintiff the fact that the policy did include such a provision as that I have just described, and that by this concealment he was led to consent to the surrender of the $50,000 policy and the substitution of the $25,000 policy.

The determination of this contention involves a decision of an issue of law and an issue of fact. With reference to the issue of law which is involved, I declare the law to be, and this may be referred to in the record now being made, as Conclusion of Law No. 1. I declare the law to be that if the defendant did, with the intention of misleading the plaintiff or knowing that the plaintiff would be misled thereby, did, having been called upon by the plaintiff to advise the plaintiff as to the coverage of the $50,000 policy, and more particularly to advise the plaintiff as to whether that policy included a provision of indemnity on account of total and permanent disability, if, under those circumstances the defendant untruthfully advised the plaintiff [fol. 54] and advised him that the policy did not include such a provision, or if the defendant, by failing to fully advise the plaintiff, concealed from him the fact that the policy did contain such a provision, and if the defendant so led the plaintiff to consent to the surrender of his $50,000 policy and to the substitution therefor of a $25,000 policy, and if the plaintiff did not know or was not in law conclusively presumed to know that the $50,000 policy did contain a provision for indemnity for total and permanent disability, and if, therefore, the plaintiff was deceived by the concealment, if any, of the defendant, then the plaintiff

is in equity entitled to a decree reinstating the $50,000 policy.

In connection with this declaration of law, and as a corollary thereto, the Court further declares the law to be: that under the facts and circumstances of this case, an insured to whom a policy of insurance has been delivered, who has that policy in his possession, if there is nothing in the application for the policy that is inconsistent with the terms of the policy, is conclusively presumed to know the provisions of the policy, and that under the facts and circumstances of this case, this plaintiff was conclusively presumed to know that the $50,000 policy did contain a provision entitling the insured under certain conditions therein stated to the indemnity mentioned of $500 per month upon receipt of due proof that the insured was totally and permanently disabled.

Now, having thus declared the law, I decide an issue of fact, which may be described in the record as the Court's Finding of Fact No. 1. I find the fact to be that the defendant did not in any manner or by any means conceal from the plaintiff that the $50,000 contract or policy of insurance did contain a provision for indemnity against total and permanent disability; on the contrary, the defendant advised the plaintiff that it contained such a provision.

[fol. 55] In view of the finding of fact just made, it is now proper to state a second conclusion of law, which is now stated as the Court's Conclusion of Law No. 2: Under the facts and circumstances of this case, as shown in the evidence in this case, the defendant did not by any fraud on its part induce the plaintiff to consent to the surrender of the $50,000 policy or to the substitution therefor of the $25,000 policy.

Perhaps it is unnecessary to go any further in this oral opinion. What I have thus far said fully determines the case. I think, however, that I should make one further finding of fact concerning an issue of fact that is involved in the case, although perhaps its decision, in view of what I have already said, is not absolutely necessary.

If the decision of that issue of fact which was decided in finding of fact No. 1 had been otherwise, and if the law

as set out in conclusion of law No. 1 had been otherwise, and if, therefore, it had been decided that the plaintiff was entitled to a reinstatement of the $50,000 policy, then it would have been necessary to have determined whether he was totally and permanently disabled as alleged in his bill, and whether, also, he had made proper proofs as required by the policy.

Now, I do not intend to pass upon the issue of fact as to whether the plaintiff mailed the letters described in evidence as Exhibits 3 and 4, and whether the defendant received those letters. The testimony of the plaintiff and of his secretary was to the effect that the two letters were mailed, and I have no reason to doubt that they were mailed. These witnesses, one of them the plaintiff, was, of course, interested in the result of the case, but I am certain that neither he nor his secretary would swear falsely about a fact of this kind. While I do not make any decision as to that issue, I have no doubt at all that the letters were [fol. 56] mailed as the witnesses testified that they were mailed. Whether they were received I do not know.

The evidence on that matter introduced by the defendant was to the effect that the careful search for the letters did not discover them in the files of the company. I am very sure that a careful search was made, and I am very sure that there was no attempt by these witnesses to deceive the court. I am very sure, for example, that the hypothetical situation presented by counsel for the plaintiff, that they might have had the letters actually on the desk before them, was not the fact. That would imply that they were criminals and perjurers, attempting to deceive, and I do not believe that as to these witnesses or as to any other witnesses who have testified in this case. I do not pass upon that issue of fact, but I do believe that a finding of fact should be made upon the issue as to whether the plaintiff was totally and permanently disabled within the meaning of this policy.

I say that the plaintiff has made a most favorable impression upon me. He is a man of capacity and integrity and of high standing, and I believe his testimony fully as to the nature of his malady, but because I do believe him to be a man of great ability intellectually, and of

much experience in the business world, I cannot believe, and do not believe that within the meaning of this contract of insurance that we have here, the $50,000 policy, I do not believe that he is so disabled by his malady and disease as that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit. In the light of all of the other testimony in this case, of all of the medical testimony, I think it is impossible to come to the conclusion that this plaintiff is so totally and permanently disabled. I can understand his viewpoint. I can understand what I think is the viewpoint of his learned counsel. He certainly is totally disabled, I would think, [fol. 57] from carrying on the same kind of a business enterprise as that upon which he was engaged and at which he was very successful. He cannot do that nor anything of that character, but it is an incorrect interpretation of this contract to conclude that if he cannot do what he did do therefore, he is totally disabled within the meaning of this contract. This contract says that to be totally disabled he must be unable to engage in any occupation whatsoever for remuneration or profit. Now, that means any one of a thousand occupations. I have not the slightest doubt but that the plaintiff has the ability, for example, to carry on the occupation of clerk of this court, of the deputy clerk who sits here in this chair, or work of any similar character. I believe that it has not been proved that the plaintiff, within the meaning of this contract, is now or has been at the times alleged in the petition, wholly disabled by bodily injury or disease, so that he is prevented thereby from engaging in any occupation whatever for remuneration or profit and I think the fact to be that he is not and has not been so disabled. That is finding of fact, I think, No. 2.

I do not go further.

To the conclusions of law stated by the Court, and to each of them, the plaintiff is allowed an exception. The plaintiff has requested the Court state certain conclusions of law which are numbered 1 to 8, inclusive, each of which the Court has carefully considered and each of which the

Court declines to state as the Court's conclusion of law. To the refusal of the Court to give each of these conclusions of law as requested by the plaintiff, the plaintiff is allowed an exception.

(Which said conclusions of law numbered 1 to 8, both inclusive, and each of them, so offered by the plaintiff, and refused by the Court, over the objection and exception of the plaintiff, are in words and figures as follows:)

[fol. 58] "1. That plaintiff is now, and was for more than three (3) months prior to June 29, 1934, totally disabled from disease, as said terms are used and defined in policy No. 8611895 issued by defendant to plaintiff.

2. That the evidence herein creates a presumption that the letters written defendant by plaintiff of June 29, 1934, and August 11, 1934, were each received by defendant at its home office in New York City and that there is insufficient evidence herein to rebut such presumption.

3. That the letters of June 29, 1934, and August 11, 1934, received by defendant at its home office in New York City, not being objected to by the defendant at the time they were received as being insufficient or incomplete, constituted due proof of disability within the meaning of said policy No. 8611895, and that defendant is estopped to assert that said letters did not constitute such due proof.

4. That the failure of defendant to answer the said letters of June 29, 1934, and August 11, 1934, and to advise plaintiff thereby of his rights under said policy No. 8611895 to disability benefits and a waiver of premiums, was in law and equity a fraud upon the rights of plaintiff.

5. That plaintiff, in agreeing to a reduction of the death and disability payment benefits under said policy when he did not know and was not advised of his rights thereunder to disability benefits from disease and waiver of premiums in case of total disability by disease, is not estopped from suing for the reinstatement of said policy No. 8611895 and from recovering disability benefits thereunder.

6. That plaintiff did not get the kind of insurance his written application called for and plaintiff was entitled to

rely on the presumption that the policy received, No. 8611895, was in accordance with his application and that, therefore, the presumption that plaintiff knew the contents of said policy does not apply and plaintiff is not chargeable with negligence for failure to examine such policy to discover errors.

7. That plaintiff is entiled to a reinstatement of policy No. 8611895 with defendant company.

8. That plaintiff is entitled to recover of defendant disability benefits under said reinstated policy No. 8611895 from August 20th, 1934, to this date, at the rate of $500.00 per month, together with 6% interest thereon from said August 20th, 1934, said recovery for disability benefits from November 20th, 1934, being for $13,500.00 and interest on each monthly payment from date due to this date, being $815.50, or the total sum that plaintiff is entitled to recover from defendant to this date being Fourteen Thousand Three Hundred Fifteen and 50/100 Dollars ($14,315.50).

[fol. 59] The defendant has asked certain conclusions of law which the Court declines to give, merely because the Court has stated such conclusions of law as he believes are required in the case, and that it is unnecessary to make other declarations or state any other conclusions of law. To the Court's failure to give the conclusions of law requested by the defendant, the defendant also is allowed an exception, and as to each of them, a separate exception.

(Which said conclusions of law, and each of them, so offered by the defendant, and refused by the Court, over the objection and exception of the defendant, are in words and figures as follows:)

"1. Defendant was under no legal duty to advise plaintiff that New York Life Insurance Company policy No. 8611895 contained a provision for disability benefits, even if defendant knew that plaintiff was ignorant of that fact, and even if defendant knew (which the court does not, however, find) that plaintiff was totally and permanently disabled within the meaning of said policy.

2. Oral notice by plaintiff to one or more of the employees in defendant's Kansas City branch office that

plaintiff was totally and permanently disabled is not "due proof" of disability within the meaning of Section 1 of New York Life Insurance Company policy No. 8611895, and would not entitle plaintiff to receive the disability benefits under said policy.

3. Neither of the two letters, one dated June 29, 1934, and the other dated August 11, 1934, which plaintiff claims he wrote and mailed to the Home Office of the defendant, is sufficient in law to constitute "due proof" of disability within the meaning of Section 1 of New York Life Insurance Company policy No. 8611895.

4. Plaintiff was not on August 11, 1934 and has not since been totally and permanently disabled by bodily injury or disease so that he is prevented thereby from engaging in any occupation whatsoever for remuneration or profit within the meaning of New York Life Insurance Company policy No. 8611895, as those terms are used, defined, and limited in said policy.

5. Neither defendant nor any of its servants, agents, employees or representatives, is, as a matter of law, guilty of having committed any fraud upon the plaintiff herein in the manner, form or substance charged in the plaintiff's petition.

6. That as a matter of law, plaintiff is not entitled to the relief prayed for in his petition herein; that as a matter of law, defendant is entitled to have said petition dismissed with prejudice at the plaintiff's costs.

[fol. 60] 7. That as a matter of ...w, the defendant's motion to dismiss the plaintiff's petition made at the close of plaintiff's evidence should have been sustained."

Upon the facts found by the Court, and the conclusions of law stated by the Court, the defendant is entitled to a decree in its favor, and such a decree is made and entered. The defendant has submitted a form of decree which I will read. I have not yet read it. It would seem to be in proper form.

To the decree in favor of the defendant, the plaintiff is also allowed an exception.

(To the entering of a decree, requested by the defendant, the plaintiff by his counsel, at the time duly excepted and still excepts.)

[fol. 61] Exhibit "F".

(Petition.)

In the Circuit Court of Jackson County, Missouri, at Kansas City.

James Shay, Plaintiff,
No. 457059. vs.
New York Life Insurance Company, a corporation, Defendant.

Plaintiff states that he is now and was, at all times herein mentioned, a citizen and resident of the City of Washington, District of Columbia; that the defendant is now, and was at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and is and was at all times mentioned herein duly authorized to do and was engaged in the life, health and accident insurance business in the State of Missouri; that the defendant at all times mentioned herein, and at the present time, maintains an office in Kansas City, Jackson County, Missouri, for the transaction of its usual business.

Plaintiff further states that on or about April 29, 1924, the defendant issued to one Samuel R. Toucey, its certain policy of insurance Numbered 8611895, wherein and whereby, for an annual premium of $2,182, it insured the life of the said Samuel R. Toucey in the sum of $50,000, and wherein and whereby it agreed to pay to the said Samuel R. Toucey the sum of $500 each month during the life time of the said Samuel R. Toucey, and also to waive the payment of premiums if the said Toucey should become wholly and presumably permanently disabled before attaining the age of sixty (60); that said policy is marked Exhibit "A" filed herewith, and made a part hereof.

Plaintiff further states that on or about the first day of April, 1933, and while said policy was in full force and ef-
[fol. 62] fect, the said Samuel R. Toucey became wholly

and presumably permanently disabled, and thereafter, and while said policy was in full force and effect, the said Samuel R. Toucey gave notice to the defendant that he was wholly and presumably permanently disabled; that all of such matters, facts and things occurred and took place before said Samuel R. Toucey had attained the age of sixty years.

Plaintiff further states that at all times mentioned herein the said Samuel R. Toucey had paid all premiums and charges due under the terms of said policy and said policy was in full force and effect, and that the said Samuel R. Toucey and this plaintiff have performed all the terms and conditions of said contract of insurance required of them to be performed.

Plaintiff further states that he is now the owner and holder of any and all claims arising out of said contract of insurance by virtue of the permanent disability of the said Samuel R. Toucey and that the said Samuel R. Toucey, prior to the institution of this suit, has assigned all of his right, title and interest in and to any and all claims and demands under said contract of insurance to this plaintiff.

Plaintiff further states that there is due and payable under the terms and conditions of said policy by reason of the permanent disability of the said Samuel R. Toucey, the sum of $28,000; that although due demand has been made on defendant for payment of said claim and demand, the defendant, without just cause or excuse, has failed and refused, and still fails and refuses to pay the said sum of $28,000 due under said policy, or any part thereof.

Plaintiff further states that defendants failure and refusal to pay under the terms and conditions of said policy was and is vexatious and without reasonable cause or excuse, and that by reason of the defendant's vexatious refusal to pay said loss and damage, this plaintiff has been compelled to employ attorneys to institute and prosecute this action; that a reasonable attorneys fee for the institution and prosecution of this action is $10,000.

[fol. 63] Wherefore, Plaintiff prays judgment against the defendant in the sum of $28,000, together with interest

thereon at the rate of 6% per annum; and in the further sum of $2,800 as and for penalty for the vexatious refusal to pay said claim and demand; and for the sum of $10,000 as and for a reasonable attorneys fee; and for costs.

CORNELIUS ROACH,
M. W. BORDERS, JR.,
Attorneys for Plaintiff.

[fol. 64] (Order Granting Samuel R. Toucey Leave to File Answer to Supplemental Bill in Equity.)

Now on this day the answer of plaintiff, Samuel R. Toucey, to the supplemental bill in equity of the New York Life Insurance Company being presented to the Court, with request for leave to file the same out of time,

It Is Ordered, That said answer may be filed this 11th day of May, 1938.

MERRILL E. OTIS,
Judge.

Filed in the United States District Court May 11, 1938.

[fol. 65] Plaintiff's Answer to Supplemental Bill in Equity of New York Life Insurance Company.

In the District Court of the United States for the Western Division of the Western District of Missouri.

April, 1938, Term.

Samuel R. Toucey, Plaintiff,
No. 2810. vs. In Equity.
New York Life Insurance Company, a corporation, Defendant.

Comes now Samuel R. Toucey, and for his answer to the supplemental bill in equity of the New York Life Insurance Company, alleges and states as follows:

1. Said Samuel R. Toucey admits that on or about the 26th day of October, 1935, he commenced an action in equity against the New York Life Insurance Company in the Circuit Court of Jackson County, Missouri; that Exhibit "A" attached to defendant's supplemental bill in

equity is a true copy of said petition containing therein all the allegations and averments thereof.

2. Said Samuel R. Toucey admits that pursuant to the filing of the aforesaid petition summons was duly issued and served on New York Life Insurance Company; that on the return date said New York Life Insurance Company removed said cause to the United States District Court for the Western District of Missouri; that thereafter and on February 21, 1936, said New York Life Insurance Com-[fol. 66] pany filed a motion to dismiss said cause; that said motion was overruled by the Court on the 13th day of March, 1936; that thereafter on April 23, 1936, New York Life Insurance Company filed its answer and motion to dismiss said cause and plaintiff admits that Exhibit "B" attached and made a part of the supplemental bill in equity of New York Life Insurance Company is a true copy thereof and contains all the allegations of said answer and motion to dismiss.

3. Said Samuel R. Toucey admits that on or about the 25th day of May, 1936, he filed a reply to defendant's answer and that a true copy of said reply is attached to defendant's supplemental bill and marked Exhibit "C".

4. Said Samuel R. Toucey admits that thereafter said cause came on for trial on the 18th day of November, 1936, before the Honorable Merrill E. Otis, District Judge, and that said Court rendered and entered a decree, a true copy of which is attached to defendant's supplemental bill as a part thereof and marked Exhibit "D".

5. Said Samuel R. Toucey admits that at the trial of said cause both said Toucey, as plaintiff, and New York Life Insurance Company, as defendant, offered testimony upon the issue whether said Toucey was totally and permanently disabled.

6. Said Samuel R. Toucey admits that at the close of the evidence in said cause, this Court delivered the opinion, copy of which is attached to defendant's supplemental bill, made a part thereof and marked Exhibit "E", but states that in said opinion the Court found as fact and declared as law that the plaintiff, Samuel R. Toucey did not ask pecuniary relief unless he be first granted the rein-

statement of the $50,000.00 policy, and that since the Court denied reinstatement its said ruling fully determined the case so that it was not necessary that the Court make a finding with reference to the issue of disability.

[fol. 67] Said Samuel R. Toucey further states that the Court in determining adversely to him the equitable issues upon which reinstatement was asked, thereupon lost jurisdiction of said cause and had no authority, power or jurisdiction to determine the legal issue as to disability and that its determination was and is in excess of the jurisdiction of said court void and without any legal effect whatsoever, and plaintiff specifically denies that said decree or the Court's opinion were or are final, conclusive or res judicata of any of the legal issues raised in the trial of said cause, and particularly the issue as to whether said Toucey was or had been totally and permanently disabled within the meaning of said policy.

7. Said Samuel R. Toucey admits that on December 28, 1937 one James Shay commenced an action in the Circuit Court of Jackson County, Missouri, at Kansas City, numbered 457,059, entitled James Shay, Plaintiff, vs. New York Life Insurance Company, a corporation, defendant, and that Exhibit "F", attached to and made a part of defendant's supplemental bill in equity is a true copy of said petition.

8. Said Samuel R. Toucey further states that prior to the institution of said suit he did assign all of his right, title and interest in and to any and all claims and demands under policy of insurance No. 8611895, issued by the New York Life Insurance Company to said James Shay; that said assignment was made upon a consideration valid in law and for a lawful and proper purpose and said Samuel R. Toucey denies that said assignment was made by him without consideration; denies that said assignment is colorable and a sham and pretext to evade the jurisdiction and decree of this Court; denies that said assignment is a fraud upon this court; denies that said assignment was made to defeat the decree and adjudication of this court or in defiance and violation thereof; denies that said assignment is the result of a collusive and fraudulent plan between said Toucey and said Shay; denies that said as-

[fol. 68] signment is for the purpose and with the object of nullifying the decree of this Court by securing a re-adjudication of issues presented and adjudged herein and states that said suit filed by said James Shay on the cause of action assigned to him by plaintiff was and is a cause of action at law, and that the issues involved in said suit have never been lawfully adjudicated by this or any other Court, and states that the adjudication of this Court upon the hearing heretofore had herein was and is res judicata only as to the equitable issues upon which reinstatement was sought and was and is not res judicata upon the legal issue of disability involved in said suit now pending before the Circuit Court of Jackson County, Missouri.

9. Said Samuel R. Toucey denies that defendant has no adequate remedy at law and alleges and states that if the decision and decree of this court heretofore rendered herein is res judicata of the issues involved in the suit now pending in the Circuit Court of Jackson County, Missouri, then said New York Life Insurance Company has a full, complete and adequate remedy at law by appearing therein and pleading the facts upon which it is claimed the judgment of this Court is res judicata of the issues there involved.

10. Said Samuel R. Toucey further states that the supplemental bill in equity of New York Life Insurance Company is wholly without equity, that said so-called supplemental bill is not supplemental to any bill heretofore at any time filed in behalf of the New York Life Insurance Company, and the relief sought therein is not supplemental to any decree or relief heretofore granted the New York Life Insurance Company in the above entitled suit; that the New York Life Insurance Company has a plain, adequate and complete remedy at law and said supplemental bill in equity is in violation of the provisions of Section 384 of Title 28 of the United States Code, wherein it is provided that suits in equity shall not be sustained in [fol. 69] any court of the United States in any case where a plain, adequate and complete remedy may be had at law.

11. Said Samuel R. Toucey further states that the supplemental bill in equity of New York Life Insurance Company seeks to stay proceedings in the Circuit Court of Jackson County, Missouri, in violation of the provisions of

Section 379 of Title 28 of the United States Code, wherein it is provided that the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.

12. Said Samuel R. Toucey further states that the supplemental bill in equity was and is defective for want of parties defendant in that it appears from the face thereof that James Shay is not a party defendant, although the relief sought is the stay of a suit brought by him in the Circuit Court of Jackson County, Missouri.

13. Further answering, said Samuel R. Toucey denies each and every other allegation of fact contained in said supplemental bill in equity, not heretofore expressly admitted or directly controverted by the allegations of this answer.

Wherefore, Said Samuel R. Toucey, having fully answered, prays that said supplemental bill in equity be dismissed and that he be discharged with his costs herein.

M. W. BORDERS, JR.,
CORNELIUS ROACH,
WILFRED WIMMELL,
Solicitors for Plaintiff,
Samuel R. Toucey.

[fol. 70] State of Missouri,
County of Jackson—ss.:

Wilfred Wimmell, being duly sworn on his oath, states:

That he is one of the Solicitors for Samuel R. Toucey, and states that the matters and facts set forth in the above and foregoing answer are true and correct, as he verily believes.

WILFRED WIMMELL.

Subscribed and sworn to before me this 10th day of May, 1938.

BLANCHE I. LEE,
(Notarial Seal) Notary Public.

My commission expires November 15, 1938.

Filed in the United States District Court May 11, 1938.

[fol. 71] Stipulation Respecting Testimony of James Shay.

It is hereby stipulated and agreed by and between the parties hereto that James Shay, if produced, sworn and examined as a witness in the above entitled cause, will testify as follows:

1. My name is James Shay.

2. I am now a resident of Washington, D. C., and have resided in Washington, D. C., for ten years.

3. My present residence address is McReynolds Apartments, Washington, D. C.

4. I am now engaged, and for several years have engaged in, public relations work, and maintain an office at Press Building, Washington, D. C.

5. I have been acquainted with M. W. Borders, Jr., an attorney of Kansas City, Missouri, for six or seven years.

6. I have never met and am not acquainted with Major Samuel R. Toucey of Kansas City, Missouri.

7. On or about December 10, 1937, I was requested by M. W. Borders, Jr., to accept an assignment from Major Samuel R. Toucey of a claim or cause of action for disability benefits claimed by Major Toucey to have accrued to him under Policy No. 8611895 issued by the New York Life Insurance Company. A copy of that assignment is attached hereto and made a part hereof and marked Exhibit "A".

[fol. 72] 8. I have no information nor knowledge as to the nature or character of the claim, excepting such general facts as were imparted to me by Mr. M. W. Borders, Jr.

9. I accepted the assignment of the claim or cause of action and employed Mr. M. W. Borders, Jr., and Mr. Cornelius Roach of Kansas City, Missouri, as my attorneys to prosecute such claim or cause of action.

10. In event a recovery is had in the matter referred to, I will account for such proceeds to Major Toucey after deduction of all costs and expenses and the attorneys' fees

of the firm of Borders, Borders and Warrick of Kansas City, Missouri, of which M. W. Borders, Jr., is a member.

11. I gave Major Toucey no cash or other thing of value for the assignment, except such as said assignment shows.

12. I accepted the assignment of the cause of action as an accommodation to Mr. M. W. Borders, Jr., it being my understanding that the legal title to the cause of action being in my name and the suit being prosecuted in my name, and my being a resident of the District of Columbia, there would be no diversity of citizenship as between me and the New York Life Insurance Company within the meaning of the statutes relating to the removal of causes of action.

13. I have made no agreement to pay the costs in this action, but all costs and expenses will be deducted from any recovery before remittance to Major Toucey. Such costs as were advanced upon the filing of the case of James Shay, Plaintiff, vs. New York Life Insurance Company, Defendant, now pending in the Jackson County Circuit Court at Kansas City and numbered 457059, in which I am plaintiff, were not advanced by me, nor did I supply the facts set forth in the allegations of the petition in said case.

14. I have no express agreement with anyone that I shall receive a fee in connection with said assignment or in connection with any litigation relating to said New York [fol. 73] Life Insurance Company policy No. 8611895.

15. I have agreed to pay an attorneys' fee in connection with the claim made on New York Life Insurance Company policy No. 8611895 to the extent that if Messrs. Borders & Roach are successful in collecting any sum on said policy by suit or otherwise I am obligated to distribute a certain portion of said sum to Messrs. Borders & Roach and turn over the balance to Major Samuel R. Toucey.

It is further hereby agreed and stipulated by and between the parties hereto that this stipulation may be offered in evidence by either party at the trial of this cause, together with Exhibit "A" thereto attached, in lieu of the

actual testimony of said James Shay, with the same force and effect as though said James Shay had appeared and testified at the trial in person or by deposition, subject only to the right of either party to object to the competency, relevancy and materiality of the facts set forth in this stipulation.

M. W. BORDERS, JR.,
CORNELIUS ROACH,
WILFRED WIMMELL,
Solicitors for Plaintiff.

GEO. J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Solicitors for Defendant.

Filed in the United States District Court July 5, 1939.

[fol. 74] Exhibit "A".

Assignment Agreement.

This Agreement, Made and entered into this fifteenth day of December, 1937, at Kansas City, Jackson County, Missouri, by and between Samuel R. Toucey, of Kansas City, Jackson County, Missouri, party of the first part, and James Shay, of the City of Washington, District of Columbia, party of the second part; Witnesseth:

Whereas, New York Life Insurance Company, a corporation, executed and delivered its policy No. 8611895, wherein it agreed to pay Samuel R. Toucey Five Hundred ($500.00) Dollars each month during the life time of the said Samuel R. Toucey, and also to waive the payment of premiums on said policy, if the insured became wholly and presumably permanently disabled before age sixty (60), and the said Samuel R. Toucey did, on or about April 1, 1933, become wholly and presumably permanently disabled before attaining the age of sixty (60), and while said contract of insurance was in full force and effect, and the said New York Life Insurance Company became indebted to Samuel R. Toucey by reason thereof.

Now, Therefore, The said Samuel R. Toucey hereby transfers, assigns and sets over unto the said James Shay, any and all claims, demands and choses in action against the said New York Life Insurance Company arising by virtue of said contract of insurance by reason of the disability of the said Samuel R. Toucey.

In Consideration Whereof, The said James Shay hereby agrees to exercise reasonable care and diligence to enforce said claims, demands or rights of action and, after deducting all costs and expenses in so doing, to hold the proceeds or amounts in trust for the use and benefit of the said Samuel R. Toucey. It is the intention of the parties hereto that the said James Shay shall have the full and complete legal and equitable title to the above claims and choses in action, and that he shall be a trustee of the express trust [fol. 75] herein set forth and created in accordance with the laws of the State of Missouri.

In Witness Whereof, The parties hereto have hereunto set their hands and seals this fifteenth day of December, 1937.

(Signed) SAMUEL R. TOUCEY,
First Party.

(Signed) JAMES SHAY,
Second Party.

I, James Shay, assignee and trustee of the claims of Samuel R. Toucey against the New York Life Insurance Company arising out of the contract of insurance and disability of the said Samuel R. Toucey above described, hereby appoint, retain and authorize Cornelius Roach and M. W. Borders, Jr., both of Kansas City, Missouri, attorneys at law, as my attorneys to institute and prosecute any and all necessary suits to enforce and collect said claims, and I further auhtorize Cornelius Roach, my attorney, to retain such additional counsel as in his opinion may be advisable to assist in the prosecution of said claims.

Dated this fifteenth day of December, 1937.

(Signed) JAMES SHAY.

[fol. 76] (Final Decree and Order for Permanent Injunction.)

The above entitled cause having come on to be heard before the Court on defendant's verified supplemental bill in equity herein and the answer of plaintiff, Samuel R. Toucey to said supplemental bill, and the defendant having appeared by its solicitors, Messrs. Richard S. Righter and Horace F. Blackwell, Jr., and plaintiff having appeared by his solicitor, Mr. Cornelius Roach, Jr., and the Court having heard the evidence and the argument of counsel, the Court finds the issues in favor of defendant and against the plaintiff and finds that defendant is entitled to the relief prayed for in its said supplemental bill in equity herein.

Now, Therefore, it is hereby Ordered, Adjudged and Decreed as follows:

1. That the purported rights attempted to be asserted by James Shay in the case of James Shay, Plaintiff, vs. New York Life Insurance Company, Defendant, in the Circuit Court of Jackson County, Missouri, numbered 457,059 in said Court, were fully and finally determined and adjudicated by this Court in the final decree in this case entered on the 22nd day of November, 1936; that said decree is res adjudicata of all rights attempted to be asserted by said Shay in said suit in said Circuit Court;

2. That Samuel R. Toucey and his said attorneys, Cornelius Roach, Jr. and M. W. Borders, Jr., forthwith physically surrender to the Marshal of this Court New York Life Insurance Company Policy No. 8,611,895 and that said Marshal totally destroy said policy and report the fact in writing to the Clerk of this Court when he has complied with this order;

3. That the order for a preliminary injunction and the preliminary writ of injunction heretofore issued out of and under the seal of this Court be and the same are hereby made permanent, and that a permanent writ of injunction upon the same terms and conditions as said preliminary writ of injunction forthwith issue out of and under [fol. 77] the seal of this Court;

4. That defendant herein have its costs herein incurred and expended.

MERRILL E. OTIS,
Judge.

Entered this 14 day of August, 1939.

Filed in the United States District Court Aug. 14, 1939.

(Permanent Writ of Injunction with Marshal's Return.)

The United States of America,
Western District of Missouri.—ss.:

The President of the United States of America,

To Samuel R. Toucey and His Agents, Servants, Employees and Assigns, Including James Shay, and the Attorneys of Said Samuel R. Toucey and Said James Shay and Those in Active Concert or Participating With Them,—Greeting:

Whereas, New York Life Insurance Company, a corporation, a citizen and resident of the State of New York, has heretofore duly filed in the above entitled cause its supplemental bill in equity, seeking, among other things, an injunction against the above persons, and a preliminary writ of injunction heretofore issued out of and under the seal of this Court against them pursuant to an order for such injunction duly made and entered herein; and

Whereas, upon a final hearing on the merits of said cause, the Court has duly ordered a permanent writ of injunction to issue out of and under the seal of this Court upon the same terms as those contained in said preliminary writ of injunction;

Now, Therefore, we, having regard to the matters in said supplemental bill contained and the order of the Court for a permanent writ of injunction herein, do hereby permanently strictly enjoin and restrain you the said Samuel R. [fol. 78] Toucey, and your agents, servants, employees and assigns, including the aforesaid James Shay, and you, the attorneys of said Samuel R. Toucey, and you in active con-

cert or participating with them, and each of you, either in the name of said Toucey or in the name of said Shay, or in the name of any other person, from bringing or further prosecuting any suit or suits, action or proceeding, of any kind or character in any court or tribunal whatsoever, or committing any other act of any description for the purpose, or having the effect, of seeking, inducing or causing a retrial, reconsideration or readjudication of the issues adjudged by this Court in its decree issued herein November 22, 1936, and from prosecuting or proceeding in any manner whatsoever in, or attempting to prosecute or proceed in, the suit and action entitled James Shay, Plaintiff, vs. New York Life Insurance Company, a corporation, Defendant, Number 457059, now pending in the Circuit Court of Jackson County, Missouri, at Kansas City, which commands and enjoins you and each of you are respectively required to observe and obey.

Hereof fail not under penalty of the law thence ensuing.

(Seal) A. L. ARNOLD,
District Court.

Dated this 14th day of August, 1939 at Kansas City, Missouri.

United States of America,
Western Division of the
Western District of Missouri.

I hereby certify I received this writ, August 14, 1939 and executed the within Writ, by delivering a copy of said Writ of Injunction and copy of the attached Final Decree, to Samuel R. Toucey, at his residence 131 W. 61 St Terrace, Kansas City, Mo., and making demand upon said Toucey for [surrended] policy =861895, (New York Life Insurance Company Policy).

I further executed the within Writ by delivering a copy of said permanent Writ of Injunction and a copy of the attached Final Decree to Cornelius Roach, Jr., one of the attorneys for said Toucey at the office of Cornelius Roach, [fol. 79] Jr., at 1014 National Fidelity Building, 10 and Walnut Street, Kansas City, Mo.

Said Toucey stated he could not deliver said policy to me because it is in the possession of said Roach. Said Roach refused to deliver said policy to me.

All done in Jackson Co. on this 15th day of August, 1939.

M. F.	4.00	H. L. DILLINGHAM,
Dept. Ex.	.48	By J. W. Murphy.
	$4.48	

Filed in the United States District Court Aug. 24, 1939.

(Notice of Appeal.)

Notice is hereby given that Samuel R. Toucey, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Eighth Circuit from the final decree and order for permanent injunction entered in this action on August 14, 1939.

CORNELIUS ROACH,
Attorney for Appellant,
1002 Walnut,
Kansas City, Mo.

Copy of above Notice of Appeal mailed to Lathrop, Crane, Reynolds, Sawyer & Mersereau, Attorneys for the defendant, November 9th, 1939.

E. O'KEEFE,
Deputy Clerk.

Filed in the United States District Court Nov. 9, 1939.

[fol. 80] (Cost Bond on Appeal.)

Know All Men By These Presents, That we, Samuel R. Toucey, as principal, and Continental Casualty Company, as surety, are held and firmly bound unto the New York Life Insurance Company, a corporation, in the full and just sum of Two Hundred Fifty ($250) Dollars to be paid to the said New York Life Insurance Company, its attorneys, successors or assigns to which payment well and

truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

The condition of the above obligation is that whereas in a proceeding in the above entitled cause between Samuel R. Toucey, plaintiff, and the New York Life Insurance Company, a corporation, defendant, a final decree and order was issued granting said New York Life Insurance Company a permanent injunction against said Samuel R. Toucey and the said Samuel R. Toucey having filed his notice of appeal to the United States Circuit Court of Appeals for the Eighth Circuit to reverse the said decree and order in said suit.

Now Therefore, if the said Samuel R. Toucey shall prosecute his said appeal to effect and answer all costs, if he shall fail to sustain his appeal, then the above obligation to be void; otherwise to remain in full force and effect.

Witness our hands and seals this 25th day of October, 1939.

S. R. TOUCEY, (Seal)
Principal.

CONTINENTAL CASUALTY
COMPANY, (Seal)
By Roger A. Durkee,
Surety.
Attorney-in-fact.

Filed in the United States District Court Nov. 9, 1939.

[fol. 81] (Order Extending Time to File Transcript.)

December 15, 1939.

Now on this day the application of the appellant, Samuel R. Toucey, for an order extending the time to file transcript of the record and for docketing of his appeal in this case, being presented to the Court, and the Court having duly considered said application, Now, Therefore, for good cause shown, it is hereby Ordered that the time for filing transcript of the record in this cause and for docketing the appeal of Samuel R. Toucey in the United States Circuit

Court of Appeals for the Eighth Circuit is hereby enlarged and extended to on or before January 18, 1940.

Dated at Kansas City, Missouri, this 15 day of December, 1939.

MERRILL E. OTIS,
United States District Judge.

Filed in the United States District Court Dec. 15, 1939.

[fol. 82] Statement of Points to be Relied Upon.

Comes now Samuel R. Toucey, plaintiff in the above entitled cause, and files the following statement of points upon which he will rely in the prosecution of the appeal in said cause from the final decree and order of this court entered on the 14th day of August, 1939, granting a permanent writ of injunction.

1. The court erred in entering judgment for the defendant, New York Life Insurance Company, upon the so called supplemental bill in equity for the following reasons:

(a) It appears from the face of the so called supplemental bill that the court lost all jurisdiction of the case at the time the court determined adversely to Toucey the equitable issues upon which the suit was founded and the court had then no jurisdiction to determine the dependent legal issues in said equity suit or to entertain the so called supplemental bill in equity under which the injunction was issued.

(b) It appears from the face of the so called supplemental bill that the determination of the legal issue of disability was unnecessary to a final determination of the equity suit brought by Toucey.

(c) The so called supplemental bill fails to state facts sufficient to constitute a cause of action for injunctive relief.

(d) It appears upon the face of the so called supplemental bill that it is wholly without equity.

(e) The injunction was improvidently granted.

2. The court erred in entering judgment for defend-
[fol. 83] ant, New York Life Insurance Company upon the

so called supplemental bill in equity for the following reasons:

(a) The injunction stays proceedings in the Circuit Court of Jackson County, Missouri in violation of the provision of Section 379 of Title 28 of the United States Code.

Wherefore, Plaintiff prays that said final decree and order be reversed and for such other and further relief as to the court may seem just and proper.

CORNELIUS ROACH,
Attorney for Plaintiff,
Samuel R. Toucey.

Service of the above Statement of Points accepted and acknowledged this 27th day of December, 1939.

GEORGE J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Attorneys for Defendant.

Filed in the United States District Court Dec. 27, 1939.

[fol. 84] (Designation of Matters to be Included in Record on Appeal.)

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Eighth Circuit pursuant to an appeal in the above entitled cause and to include in such transcript of record the following and no other papers and exhibits, to-wit:

1. Application of New York Life Insurance Company for leave to file supplemental bill in equity, filed March 10, 1938.

2. Order granting New York Life Insurance Company leave to file supplemental bill, dated March 10, 1938.

3. Supplemental bill in equity of New York Life Insurance Company, filed March 10, 1938.

4. Order granting leave to plaintiff to file answer to supplemental bill of New York Life Insurance Company, dated May 11, 1938.

5. Plaintiff's answer to supplemental bill, filed May 11, 1938.

6. Stipulation respecting testimony of James Shay, filed July 5, 1939.

7. Final decree and order for permanent injunction, dated August 14, 1939.

8. Permanent writ of injunction, dated August 14, 1939, with return of marshall thereon, dated August 24, 1939.

9. Plaintiff's notice of appeal, filed November 9, 1939.

[fol. 85] 10. Cost bond of plaintiff, filed November 9, 1939.

11. Plaintiff's statement of points, filed herewith.

12. This designation of parts of the record with admission of service thereon.

13. Order extending time to file transcript and to docket appeal dated December 15, 1939.

14. Clerk's certificate.

Said transcript of record to be prepared and filed as required by law and the rules of this court and of the United States Circuit Court of Appeals for the Eighth Circuit and to be filed in the office of the clerk of the United States Circuit Court of Appeals at St. Louis, Missouri.

CORNELIUS ROACH,
Attorney for Appellant,
1002 Walnut,
Kansas City, Mo.

Service of the above Designation acknowledged this 27th day of December, 1939.

GEORGE J. MERSEREAU,
RICHARD S. RIGHTER,
HORACE F. BLACKWELL, JR.,
Attorneys for Appellee.

Filed in the United States District Court Dec. 27, 1939.

[fol. 86] (Order Further Extending Time to File Transcript.)

January 18, 1940.

Now on this day the application of appellant, Samuel R. Toucey, for an order extending the time to file transcript of the record and for docketing of his appeal in this case, being presented to the Court, and the Court having duly considered said application, Now, Therefore, for good cause shown, it is hereby Ordered that the time for filing transcript of the record in this cause and for docketing the appeal of Samuel R. Toucey in the United States Circuit Court of Appeals for the Eighth Circuit is hereby enlarged and extended to on or before February 7, 1940.

Dated at Kansas City, Missouri this 18 day of January, 1940.

MERRILL E. OTIS,
United States District Judge.

Filed in the United States District Court Jan. 18, 1940.

[fol. 87] (Clerk's Certificate to Transcript.)

United States of America,—Set.:

I, A. L. Arnold, Clerk of the District Court of the United States for the Western District of Missouri, do hereby certify that the foregoing is a full, true and complete transcript of the record and proceedings, as called for in the Designation filed herein and made a part hereof, in the cause [wherin] Samuel R. Toucey is Plaintiff and New York Life Insurance Company, a corporation is Defendant, as fully as the same appears on file and of record in my office.

Seal
U. S. Dist. Court
West. Div.
West. Dist.
of Mo.

Witness my hand as clerk and the seal of said court. Done at office in Kansas City, Missouri, this 3rd day of February, A. D. 1940.

A. L. ARNOLD, Clerk,
U. S. District Court,
By H. C. Spaulding,
Deputy Clerk.

Filed Feb. 7, 1940. E. E. Koch, Clerk.

[fol. 73] [Appearances of counsel omitted in printing]

[fol. 74] [Notice of Hearing of Motion of Appellee for Affirmance of Decree, etc., filed April 22, 1940, omitted in printing]

[fol. 75] In United States Circuit Court of Appeals, Eighth Circuit

Motion of Appellee for Affirmance of Decree and Order for Permanent Injunction, etc.—Filed April 22, 1940

Now comes New York Life Insurance Company, appellee in the above entitled cause and prays the Court to affirm the final decree and order for permanent injunction rendered and entered herein by the District Court of the United States for the Western Division of the Western District of Missouri on August 14, 1939 (page 64 of the printed record now on file herein), without hearing oral argument upon the merits of this appeal, upon the ground and for the reason that appellant's statement of points to be relied upon in his brief on this appeal and his statement of points to be argued together with the cases therein cited are identical with the "Assignments of Error Intended to be Urged" and the "Points to be Argued" set forth in appellant's brief in cause No. 11,228 in this Court, being an appeal from a preliminary injunction issued herein by said District Court, and for the reason that all of said issues were fully considered by this Court and ruled by it in favor of this appellee on said first appeal, the opinion upon said first appeal being set forth in the case of Toucey v. New York Life Insurance Company, 102 F. (2d) 16, said opinion having been handed down on February 24, 1939, a rehearing therein denied on March 16, 1939 and the Supreme Court of the United States having denied a writ of certiorari therein on May 29, 1939 (307 U. S. 638), and for the reason that the appeal herein is frivolous.

Richard S. Righter, Horace F. Blackwell, Jr., Attorneys for Appellee, 1900 Fidelity Bldg., Kansas City, Missouri; Louis H. Cooke, 51 Madison Avenue, New York City, New York; Lathrop, Crane, [fol. 76] Reynolds, Sawyer & Mersereau, 1900 Fidelity Bldg., Kansas City, Missouri, of Counsel.

SUGGESTIONS IN SUPPORT OF MOTION FOR AFFIRMANCE OF DECREE AND ORDER FOR PERMANENT INJUNCTION BELOW WITHOUT ARGUMENT

I

On the first appeal of this case from the preliminary injunction issued by the trial court, the first point argued by Mr. Toucey's counsel was this (cause No. 11228, brief page 9):

"When the trial court in the equity case determined the equitable issues adversely to Toucey it lost jurisdiction to determine the dependent legal issue of disability and that issue is not *res judicata.*"

On the present appeal, which is from the final decree making permanent the preliminary injunction, the first point argued in the brief of Mr. Toucey's counsel is as follows (brief page 8):

"When the trial court in the original equity case determined the equitable issues adversely to Mr. Toucey, it lost jurisdiction to determine the dependent legal issue of disability and that issue is not *res adjudicata.*"

It will be observed that the wording of the points in the two briefs are identical except that the word "original" appears in the point in the second appeal and not on the first. This question was considered with great care in a [fol. 77] scholarly opinion by Judge Woodrough, in which he ruled as follows (102 F. (2d) l. c. 20):

"Insofar as Mr. Toucey's prayer for recovery for his disability payments may be regarded as a dependent legal claim, it was a claim dependent upon Mr. Toucey's establishing his right to reinstatement of his entire policy. That right in turn was dependent upon proving the disability occasioning premium waiver and aiso upon the alleged fraud of the insurance company in respect to said disability. Unless and until the equity court had before it evidence to justify it in finding both the disability and the fraud relating thereto, it could not award judgment on the disability provisions of the policy. But both of those claims were asserted and in controversy before it and the court of equity was called upon to decide upon both controversies. It did

consider the evidence on both issues and we are cited to no case implying that a court of equity lacks power to fully and finally adjudicate all equitable controversies presented by the pleadings and the evidence in a case within its jurisdiction. Its adjudication on each claim in controversy was equally conclusive and binding upon Mr. Toucey."

It will also be found that the cases cited by appellant in support of the proposition urged here are the same as those cited in his first brief. A few additional cases will be found cited, but those cases do not bear upon any question in controversy before the Court. They merely rule what appellee has never disputed, that a suit in equity may be maintained for the reinstatement of an insurance policy wrongfully cancelled (brief page 12).

[fol. 78] Appellant, in effect, concedes that the same issues are now before the Court which were adjudicated on the previous appeal. He says (brief page 10), "The Matter is again brought before this court on appeal from the final decree because of a sincere belief an improper result has been reached and a grave injustice done." Appellant, however, has advanced no new ground to sustain this claim. His reasons and his authorities are the same.

II

The second and last ground advanced by appellant on the appeal from the preliminary injunction (No. 11,228, brief page 9) is as follows:

"The equity suit and the action in the state court on the policy bring actions *in personam*, the federal court is prohibited by the provisions of Section 379 of Title 28 of the United States Code from staying the proceedings in the state court."

The second and last ground advanced by appellant on the present appeal from the final decree is as follows (brief page 9):

"The equity suit and the action at law on the policy are both actions *in personam* and the federal court is prohibited by the provisions of Section 379, Title 28, United States Code Annotated, from staying the proceedings in the state court."

It will be observed that again the points relied on are identical. It will also be found that the cases relied upon are exactly the same, except that fewer cases are cited on the second appeal than on the first.

This point was also disposed of by this Court's original [fol. 79] opinion after most careful consideration, the Court holding that the trial court clearly had jurisdiction in an ancillary proceeding such as this to protect its own decree against a subsequent state court suit by injunction, the effect of which would be to nullify that decree by permitting a relitigation of the same issue already tried by the federal court in the original case. This Court held that such injunction in this case was necessary to give protection to the original decree (see 102 F. (2d) l. c. 21, 22, 23).

It is not necessary to analyze the two briefs for the purpose of demonstrating their similarity. They are not similar. They are identical. It seems to us, and we respectfully submit, that as exactly the same issues were fully briefed, argued and determined by this Court, a rehearing denied and certiorari denied, it is not in the interests of justice to require this appellee to incur the expense involved in a re-presentation of exactly the same questions disposed of before. It may be said parenthetically that appellant's answer below (R. 55) does not deny the principal allegations of fact in appellee's supplemental bill (R. 13). The only evidence introduced at the trial was a stipulation (R. 60) setting forth the testimony of assignee Shay. The sufficiency of this stipulation and of the bill to support the final decree is not challenged, except upon the grounds urged upon the first appeal, the grounds already disposed of by this court's original opinion.

In Chicago, St. P., M. & O. Ry. Co. v. Kulp, 102 F. (2d) 352, this Court, by Judge Van Valkenburgh, said, l. c. 354:

"This court has repeatedly held that the decision on former appeal is the 'law of the case' on a question presented [fol. 80] in that former appeal, unless the evidence introduced at the subsequent trial is substantially different from that considered on the first appeal, and must be followed in all subsequent proceedings in such case in both district and appellate courts, unless that decision is clearly erroneous and works manifest injustice. The introduction of new testimony at the second trial which is merely cumulative will not prevent the application of this doctrine on the

second appeal. While this rule of practice is not a limit of power, it is nevertheless a salutary one, and should be departed from only after careful consideration on situations arising in specific cases. The following cases announce the principles declared by this court: Pennsylvania Mining Co. v. United Mine Workers of America et al., 8 Cir., 28 F. 2d 851; Ætna Life Insurance Co. v. Wharton, 8 Cir., 63 F. 2d 378; Zurich General Accident & Liability Insurance Co., Ltd. v. O'Keefe, 8 Cir., 64 F. 2d 768; American Surety Company v. Bankers' Savings & Loan Ass'n of Omaha, Nebr., 8 Cir., 67 F. 2d 803, 804; Claiborne-Reno Co. v. E. I. Du Pont De Nemours & Co., 8 Cir., 77 F. 2d 565; New York Life Insurance Co. v. Golightly, 8 Cir., 94 F. 2d 316; Marion Steam Shovel Co. v. Bertino et al., 8 Cir., 82 F. 2d 541."

This rule applies equally where the first appeal was from the preliminary injunction (Brown v. Lanyon Zinc Co., 8 Cir., 179 F. 309; International Brotherhood v. Western Union Telegraph Co., 7 Cir., 46 F. 2d 736).

It is respectfully submitted that the motion should be sustained.

Richard S. Righter, Horace F. Blackwell, Jr., Attorneys for Appellee, 1900 Fidelity Bldg., Kansas City, Missouri.

[fol. 81] Louis H. Cooke, 51 Madison Avenue, New York City, New York; Lathrop, Crane, Reynolds, Sawyer & Mersereau, 1900 Fidelity Bldg., Kansas City, Missouri, of Counsel.

[File endorsement omitted.]

[fol. 82] In United States Circuit Court of Appeals, Eighth Circuit

Order Denying Motion of Appellee for Affirmance of Decree and Order for Permanent Injunction—April 22, 1940

This matter comes before the Court on the motion of appellee for affirmance of decree and order for permanent injunction, Mr. Richard S. Righter appearing in support

of the motion, and Mr. Cornelius Roach appearing in opposition thereto, and the Court being advised,

It is Ordered that such motion be and is hereby denied.

[fol. 83] (Order of Submission, May 17, 1940, omitted in printing.)

[fol. 84] In United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1940

No. 11,686

Samuel R. Toucey, Appellant,

vs.

New York Life Insurance Company, a Corporation, Appellee

Appeal from the District Court of the United States for the Western District of Missouri

Mr. Cornelius Roach for Appellant.

Mr. Richard S. Righter (Mr. Horace F. Blackwell, Jr., Mr. Louis H. Cooke and Messrs. Lathrop, Crane, Reynolds, Sawyer & Mersereau were with him on the brief) for Appellee.

Before Gardner, Sanborn, and Woodrough, Circuit Judges

Opinion—June 29, 1940

Sanborn, Circuit Judge, delivered the opinion of the Court:

From a final decree permanently enjoining Samuel R. Toucey from relitigating in his own name or in the name of any other person the issues determined by the court below in this cause and from attempting to prosecute or [fol. 85] proceed further in a suit pending in the Circuit Court of Jackson County, Missouri, entitled, "James Shay, Plaintiff, vs. New York Life Insurance Company, a corporation, Defendant," he has appealed.

Briefly stated, the facts are as follows: On January 2, 1924, the New York Life Insurance Company issued to

Samuel R. Toucey a $50,000 policy of life insurance, which contained a provision that $500 a month would be paid him if prior to age sixty he became totally and permanently disabled. On September 26, 1934, the policy was surrendered by the insured and was reduced so that the death benefit was $25,000, with corresponding reductions of other indemnities and in future premiums. On October 26, 1935, the insured commenced this suit in the Circuit Court of Jackson County, Missouri, to set aside the reduction of the policy and to procure its reinstatement as originally written. In his bill of complaint he alleged that in April, 1933, he became totally and permanently disabled within the meaning of the policy and was entitled to the $500 monthly disability benefits from and after that time; that he was then not advised of his rights under the policy, and that in 1934 he was fraudulently induced by the Insurance Company to accept the reduction of the policy. The prayer of his bill was for a reinstatement of the policy as originally written, and an award of the disability benefits provided for. The Company removed the suit to the court below. In its answer it denied that the insured became disabled as he alleged and denied that the reduction of the policy was induced by fraud. The issues were tried, and the court below found no fraud and no total and permanent disability of the insured, and entered a decree dismissing the insured's bill upon the merits. This decree became final. Thereafter the insured made a formal assignment of his policy and his claims thereunder to James Shay, a resident of the District of Columbia, who commenced a suit in the Circuit Court of Jackson County, Missouri, to recover the $500 monthly benefits provided for by the policy as originally [fol. 86] written, upon the ground that the insured had become totally and permanently disabled in April, 1933. The Insurance Company, with leave of court, filed its supplemental bill in the suit at bar, in which it set up the proceedings had in the court below and the attempt of the insured to have the issue of his claimed total and permanent disability relitigated in the Circuit Court of Jackson County, notwithstanding the decree of the federal court. The Company prayed for an injunction, both temporary and permanent, against any further prosecution by the insured of his claimed right of recovery which had been adjudicated. The insured answered and asserted, among other things, that the decree dismissing his bill of complaint was not res

judicata of the issue of his total and permanent disability. The court ruled that the decree of dismissal was res judicata of all the issues in the case, and granted a preliminary injunction. The insured appealed, and this Court affirmed. (Toucey v. New York Life Insurance Co., 102 F. 2d 16.) He applied to the Supreme Court for certiorari, and his application was denied. (307 U. S. 638.) The case was remanded, and thereafter the decree now appealed from was entered, the effect of which was to make the preliminary injunction theretofore granted permanent.

The final decree has the same basis in fact and law as the interlocutory decree which was considered on the former appeal. We are asked to overrule our previous decision. In his brief the appellant says: "The matter is again brought before this court on appeal from the final decree because of a sincere belief an improper result has been reached and a grave injustice done." His argument and brief present the same grounds for reversal that were urged on the former appeal.

A decision of an appellate court is, as to the legal issues considered and determined, the law of the case in any subsequent proceedings in either the trial or the appellate court, and is to be followed except where the evidence is sub- [fol. 87] stantially different, or where, between the date of the decision and the time of the reconsideration of the case, controlling authority has determined the legal issues adversely, or where it appears that the decision was clearly erroneous and that adherence to it will work a manifest injustice. Millers' Mut. Fire Ins. Ass'n of Illinois v. Bell, Judge, 8 Cir., 99 F. 2d 289, 292 nd cases cited: Chicago, St. Paul, M. & O. Ry. Co. v. Kulp, 8 Cir., 102 F. 2d 353, 354 and cases cited.

There has been no change in the evidence in this case and no change in the controlling authorities since our previous decision. It is therefore apparent that the only possible basis for overruling that decision and for reversing the decree appealed from would be that the decision on the former appeal was clearly erroneous and that adherence to it would work a manifest injustice. We are convinced that the former decision of this Court in this case was right, for the reasons therein stated. (Compare Hesselberg v. Aetna Life Ins. Co., 8 Cir., 102 F. 2d 23, 27.)

The decree appealed from is affirmed.

[fol. 88] In United States Circuit Court of Appeals, Eighth Circuit

No. 11,686

Samuel R. Toucey, Appellant,

vs.

New York Life Insurance Company, a Corporation

Appeal from the District Court of the United States for the Western District of Missouri

Decree—June 29, 1940

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court, in this cause be, and the same is hereby, affirmed with costs; and that the New York Life Insurance Company, a corporation, have and recover against Samuel R. Toucey the sum of Twenty Dollars for its costs herein and have execution therefor.

[fol. 89] In United States Circuit Court of Appeals, Eighth Circuit

[Title omitted]

Appellant's Petition for Rehearing—Filed July 15, 1940

Comes now Samuel R. Toucey, appellant herein, and respectfully petitions the court to grant him a rehearing in this cause.

The court has affirmed the final decree entered by the District Court permanently enjoining appellant from prosecuting an action upon an insurance policy which suit is pending in the Circuit Court of Jackson County, Missouri, and entitled "James Shay, plaintiff, vs. New York Life Insurance Company, a corporation, defendant."

Appellant respectfully prays the court for a rehearing on the following grounds:

[fol. 90] I

The court on this appeal has approved and adopted its previous opinion entered on a former appeal from the order of the District Court granting a permanent writ of injunction to enjoin the prosecution of the action in the state court on the insurance policy.

The first proposition asserted by appellant in the previous appeal was that when the trial court found, as a matter of fact and as a matter of law, there was no equity in the bill, it lost jurisdiction to determine the issue of disability and hence that issue was not res judicata.

In disposing of this point adversely, this court, in substance, held that when the trial court in the equity case disposed of the charge of fraud, it was necessary for the trial court in that case to decide whether Mr. Toucey was or was not permanently disabled. We respectfully submit that the reasoning of the court so advanced in the former opinion is not sound and is not supported by controlling cases.

In Dowell v. Mitchell, 105 U. S. 430, 26 Law Ed. 1144, being a bill in equity for foreclosure, it was necessary for the court, before granting relief, to find a valid debt (legal issue) and a valid Deed of Trust (equitable issue) before it could order a foreclosure. The trial court found that there was a valid debt but that the Deed of Trust was not valid and, denying foreclosure, entered a judgment on the note. On appeal, it was held by the Supreme Court that when the trial court found the Deed of Trust was not valid, it lost jurisdiction to enter judgment on the note although in order to order foreclosure the trial court must also have found there was a valid debt.

[fol. 91] The same reasoning applied by the court in its previous opinion on the former appeal and here adopted by the court, also applies with equal force to cases in which a contrary result was reached. American Falls Milling Company v. Standard Brokerage and Distributing Co., 248 Fed. 487 (C. C. A. 8); Linden Inv. Co. v. Honstain Bros. Co., 221 Fed. 178 (C. C. A. 8); Palmer v. Marshall, 24 S. W. (2d) 229 (Mo. App.); Ebel v. Roller, 21 S. W. (2d) 214 (Mo. App.); Wimer v. Wagner, 20 S. W. (2d) 650 (Mo. Sup.).

In each and every one of the cases above cited, it was necessary for the trial court to determine both legal and equitable issues favorably to the respective plaintiffs before they could grant equitable relief, but in each case, the appellate court held that, being unable to grant equitable relief the bills should have been dismissed because the trial court in each case affirmatively found they had no equitable jurisdiction.

We respectfully urge that the reasoning of the court in its previous opinion now adopted in its present opinion is illogical, unsound, unsupported by and in conflict with controlling authorities all of which this court has overlooked.

II

In its opinion on the former appeal, now adopted and approved by the court, the court in substance held that when a judgment has been entered in an equity suit pending in a Federal Court, even though that action be in personam, a Federal Court may, in spite of the prohibition contained in Section 265, Judicial Code, Title 28, U. S. C. A., Section 379, enjoin the prosecution of a subsequent suit in personam in a State Court.

[fol. 92] In support of its holding in this respect, this court cited a great many cases all but one of which involved a res and in the one exception, Brown v. Pacific Mutual Life Ins. Co., 62 Fed. (2d) 711, the court found that there was no adequate remedy excepting by injunction.

Here the court has wholly overlooked and failed to give effect to the provisions of the statutes and the fact that appellee here has an adequate remedy at law by way of a plea of res judicata in the action on the policy pending in the State Court.

This court has held that whenever final judgment is entered in an equity suit pending in the Federal Court, whether that action be in rem or in personam, it may and will protect, defend and give effect to its adjudication by enjoining proceedings in a State Court in disregard of the express provisions of the United States Statutes.

It is respectfully submitted that appellant should be granted a rehearing.

Respectfully submitted, Cornelius Roach, Attorney for Appellant.

[fol. 93] (Certificate of counsel omitted in printing.)

[File endorsement omitted.]

[fol. 94] IN UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

ORDER DENYING PETITION OF APPELLANT FOR REHEARING—
July 22, 1940

The petition for rehearing filed by counsel for appellant in this cause having been considered, It is now here ordered by this Court that the same, be and it is hereby, denied.

[fol. 95] (Order staying Issuance of Mandate, Aug. 3, 1940, omitted in printing.)

[fol. 96] (Order of Sept. 17, 1940, granting Petition of Appellant for further stay of issuance of Mandate, omitted in printing.)

[fol. 97] (Certified copy of Order of Supreme Court of the United States extending time to file Petition for Writ of Certiorari to November 21, 1940, omitted in printing.)

[fol. 98] (Order of Oct. 25, 1940, further staying issuance of mandate, omitted in printing.)

[fol. 99] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER FOR PREPARATION OF TRANSCRIPT OF RECORD FOR SUPREME COURT, ETC.—November 18, 1940

Appellant in this cause filed his motion praying that this Court furnish, without charge, certified record for filing in the Supreme Court of the United States with a petition for

writ of certiorari. Appellant has failed, however, to file proper pauper's oath with his petition.

Estimate of the Clerk's fee for certified transcript of the record was sent to appellant which included the Clerk's fee and the printer's charge for printing the additional proceedings in this Court. There being an unexpended balance in the hands of the Clerk of this Court remaining from the deposits heretofore made by appellant for Clerk's fees and printer's charge for printing the record in this Court which [fol. 100] will be sufficient to pay the Clerk's fee only for necessary transcript of the record for filing in said Supreme Court with petition for writ of certiorari but not the printer's charge for printing same, It is Ordered by this Court that said unexpended balance be applied towards the Clerk's fee and that in preparing the certified record the Clerk of this Court will omit therefrom the motions of appellant for stay of issuance of mandate of this Court filed July 29th, September 11th and October 16, 1940, which motions were granted, and also omit the motion to proceed in forma pauperis and for preparation of record without charge filed November 16, 1940, and copy thereof sworn to, filed November 18, 1940, and thus bringing the amount of the fee within the unexpended balance now in the hands of the Clerk.

[fol. 101] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 102] SUPREME COURT OF THE UNITED STATES

SAMUEL R. TOUCEY, Petitioner,

v.

NEW YORK LIFE INSURANCE COMPANY

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

On Consideration of the application of the Petitioner,

It is Ordered that the time for filing a petition for certiorari in the above entitled cause be extended to and including November 21, 1940.

Wm. O. Douglas, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of September, 1940.

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 6, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.